No. 06-571
Title: Michael A. Watson, Petitioner
v.
United States
Docketed: October 25, 2006
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (05-31094)
Decision Date: July 25, 2006
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 23 2006	Petition for a writ of certiorari filed. (Response due November 24, 2006)
Nov 16 2006	Order extending time to file response to petition to and including December 26, 2006.
Dec 14 2006	Order further extending time to file response to petition to and including January 25, 2007.
Jan 25 2007	Brief of respondent United States in opposition filed.
Feb 6 2007	Reply of petitioner Michael A. Watson filed.
Feb 7 2007	DISTRIBUTED for Conference of February 23, 2007.
Feb 26 2007	Petition GRANTED.
Mar 28 2007	The time for filing the joint appendix and petitioner's brief on the merits is extended to and including May 4, 2007.
Mar 28 2007	The time for filing respondent's brief on the merits is extended to and including June 28, 2007.
Apr 4 2007	Record received from U.S.C.A. for the 5th Circuit. (1 envelope)
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May 4 2007	Brief amici curiae of Gun Owners Foundation, et al. filed.
May 4 2007	Joint appendix filed.
May 4 2007	Statement of costs for printing received.
May 4 2007	Brief of petitioner Michael A. Watson filed.
May 4 2007	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jun 28 2007	Brief of respondent United States filed.
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No.

In the Supreme Court of the United States

MICHAEL A. WATSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 924(c)(1)(A) criminalizes the "use" of a firearm during and in relation to a drug trafficking offense and imposes a mandatory consecutive sentence of at least five years' imprisonment. In *Bailey* v. *United States*, 516 U.S. 137 (1995), this Court held that "use" of a firearm under § 924(c) means "active employment." *Id.* at 144. The question presented in this case is:

Whether mere receipt of an unloaded firearm as payment for drugs constitutes "use" of the firearm during and in relation to a drug trafficking offense within the meaning of 18 U.S.C. § 924(c)(1)(A) and this Court's decision in *Bailey*.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Fifth Circuit (App., *infra*, 1a-2a) is not reported but is available at 2006 WL 2061900. The district court's decision (App., *infra*, 3a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

In pertinent part, 18 U.S.C. § 924(c)(1)(A) provides:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime * * * for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(D) further provides, in pertinent part:

> Notwithstanding any other provision of law—

* * * * *

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

STATEMENT

18 U.S.C. § 924(c)(1)(A) criminalizes the use of a firearm during and in relation to a drug transaction. The sole issue in this case is whether a defendant who receives a firearm, in exchange for drugs, "uses" that firearm in violation of 18 U.S.C. § 924(c)(1)(A).

This Court spoke to the reverse scenario in *Smith* v. *United States*, 508 U.S. 223 (1993). In that case, this Court held that where a defendant brings a firearm to a drug transaction and employs it to barter for drugs, he has "used" the firearm within the meaning of § 924(c)(1). Three Justices dissented, arguing that bartering with a firearm does not constitute "use" within that term's ordinary meaning. *Id.* at 241-244 (Scalia, J., dissenting). Two years later, in *Bailey* v. *United States*, 516 U.S. 137 (1995), this Court unanimously clarified that "use" of a firearm under § 924(c)(1) means the "*active employment* of the firearm by the defendant." *Id.* at 143. The *Bailey* Court held that "'use' must connote more than mere possession of a firearm by a person who commits a drug offense," and that the "inert presence of a firearm, without more, is not enough to trigger § 924(c)(1)." *Id.* at 143, 149.

The circuits are deeply divided as to whether one who *receives* a firearm in exchange for drugs "uses" that firearm in violation of § 924(c)(1)(A). Indeed, the government acknow-

ledged below "that there is a split in the circuits regarding this issue." Gov't C.A. Br. 17; see *id.* at 9 ("[S]ome other circuits have found that the receipt of a firearm during a transaction is not a 'use' under [§ 924(c)(1)(A)]."); see also *United States* v. *Montano*, 398 F.3d 1276, 1282-1284 (11th Cir. 2005) (*per curiam*); *United States* v. *Stewart*, 246 F.3d 728, 731–733 (D.C. Cir. 2001); *United States* v. *Warwick*, 167 F.3d 965, 975–976 (6th Cir. 1999); *United States* v. *Westmoreland*, 122 F.3d 431, 434–436 (7th Cir. 1997).

In its decision below, however, the Fifth Circuit confirmed that it sides with four other circuits that *do* treat mere receipt of a firearm as "use" under § 924(c)(1)(A). *United States* v. *Watson*, (App., *infra*, 1a-2a); see *United States* v. *Cotto*, 456 F.3d 25, 28-29 (1st Cir. 2006); *United States* v. *Sumler*, 294 F.3d 579, 580 (3d Cir. 2002); *United States* v. *Ramirez-Rangel*, 103 F.3d 1501, 1506, 1509 (9th Cir. 1997); *United States* v. *Cannon*, 88 F.3d 1495, 1508–1509 (8th Cir. 1996); see also *United States* v. *Ulloa*, 94 F.3d 949, 955–956 (5th Cir. 1996); *United States* v. *Zuniga*, 18 F.3d 1254 (5th Cir. 1994).

This conflict has important ramifications for prosecutors and defendants alike. In circuits following the Fifth Circuit's rule, mere receipt of a firearm in a drug transaction exposes a defendant to a mandatory minimum of five years' imprisonment to be served consecutively to any other sentence imposed. 18 U.S.C. § 924(c)(1)(A)(i), (c)(1)(D). In other circuits, however, the same conduct (assuming conviction for the underlying drug transaction) would result only in exposure to a two-level sentencing enhancement under the now-advisory United States Sentencing Guidelines. See U.S.S.G. § 2D1.1(b)(1).

A. The District Court Proceedings

Petitioner Michael A. Watson, a legally blind fifty-five-year-old man (PSR ¶ 66), sought to purchase a firearm in

order to protect himself and his property against robbery and theft. App., *infra*, 9a. In November 2004, petitioner and a government informant discussed petitioner's desire to buy a firearm. *Ibid.* When petitioner asked the informant the purchase price, the informant replied that he did not know a cash price. *Ibid.* Instead, the informant offered to introduce petitioner to an individual willing to provide petitioner with a firearm in exchange for drugs. *Ibid.*

On November 12, 2004, the informant brought the individual—in actuality an undercover government agent—to petitioner's home in Ascension Parish, Louisiana. Gov't C.A. Br. 5. The government agent provided petitioner with an unloaded pistol. In exchange, petitioner provided the undercover agent with twenty-four dosage units of oxycodone hydrochloride, also known as OxyContin. App., *infra*, 9a. Immediately upon conclusion of the transaction, agents arrested petitioner. *Ibid.*

Federal prosecutors brought a three-count indictment against petitioner in the United States District Court for the Middle District of Louisiana. The charges included distribution of a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1) (Count One); use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A) (Count Two); and possession of firearms by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count Three). App., *infra*, 7a. The parties ultimately entered into a plea agreement upon stipulated facts. *Id.* at 7a-11a. Under the terms of the agreement, petitioner pleaded guilty to all counts of the indictment, but he reserved the right to appeal whether, as a matter of law, the stipulated facts supported his conviction under Count Two for use of a firearm during and in relation to a drug trafficking offense. *Id.* at 7a-8a; 3/30/05 Tr. 32-33. Specifically, petitioner maintained the right to challenge whether mere receipt of a firearm in exchange for drugs constitutes "use" of the firearm with the meaning of § 924(c)(1)(A). App., *infra*, 7a.

The district court accepted the plea agreement. 3/30/05 Tr. 46. It held that, under Fifth Circuit law, the stipulated facts sufficed to support petitioner's conviction under all three counts of the indictment. *Ibid.* Accordingly, the district court accepted petitioner's guilty pleas, treating the guilty plea to Count Two for violation of § 924(c)(1)(A) as a conditional plea under Federal Rule of Criminal Procedure 11(a)(2). *Ibid.*; see Fed. R. Crim. P. 11(a)(2) ("With the consent of the court and the government, a defendant may enter a conditional plea of guilty or *nolo contendere*, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion.").

At sentencing, the district court found that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1(a), due to two prior felony convictions (both of which were more than 15 years old). PSR ¶¶ 50-51; 11/17/05 Tr. 14. Under the career offender Guidelines, the convictions on Counts One and Three would have resulted in a sentencing range of 151–188 months' imprisonment. PSR ¶ 84; see U.S.S.G. § 4B1.1(b)(B). Where the conviction includes a violation of § 924(c), however, the career offender Guidelines require a significantly higher minimum sentence. Accordingly, petitioner's conviction on Count Two increased the applicable Guidelines range to 262–327 months. PSR ¶ 85; see U.S.S.G. § 4B1.1(c)(3). Thus, petitioner's conviction under § 924(c)(1)(A) raised his minimum Guidelines sentence by 111 months. In its judgment entered November 29, 2005, the district court imposed concurrent sentences of 202 months on Count One and 120 months on Count Three. As to Count Two, the district court sentenced petitioner to the statutory minimum, a consecutive sentence of 60 months, producing an aggregate sentence of 262 months' imprisonment. App., *infra*, 6a.

B. The Court of Appeals' Decision

Petitioner timely appealed his conviction on Count Two. As contemplated by the plea agreement, the appeal raised the sole issue of whether mere receipt of a firearm was sufficient as a matter of law to support petitioner's conviction for use of a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A). Pet. C.A. Br. 2. The Fifth Circuit affirmed petitioner's conviction based on circuit precedents established in *United States* v. *Ulloa*, 94 F.3d 949 (5th Cir. 1996), and *United States* v. *Zuniga*, 18 F.3d 1254 (5th Cir. 1994). App., *infra*, 2a.

The Fifth Circuit decided *Zuniga* before this Court's opinion in *Bailey* clarified the meaning of "use" under § 924(c)(1). In *Zuniga*, the defendants accepted multiple firearms in partial satisfaction of a debt arising from a heroin deal. On the basis of the defendants' receipt of the firearms in exchange for the drugs previously provided, a jury convicted defendants of "using" a firearm during and in relation to a drug trafficking crime, in violation of § 924(c)(1). On appeal, the Fifth Circuit affirmed the defendants' convictions, relying on this Court's opinion in *Smith*. While *Smith* specifically considered only a defendant's *active* trading of a firearm for drugs, the Fifth Circuit read the case to apply to the reverse situation of a defendant's receipt of a firearm in exchange for drugs. *Zuniga*, 18 F.3d at 1258.

Two years later (and after this Court's decision in *Bailey*), the Fifth Circuit revisited the issue. In *Ulloa*, the Fifth Circuit again held that a defendant's receipt of a firearm in exchange for drugs constituted "use" of a firearm during and in relation to a drug trafficking offense. Despite this Court's holding in *Bailey* that "§ 924(c)(1) requires evidence sufficient to show an *active employment* of the firearm by the defendant," 516 U.S. at 143, a divided panel of the Fifth Circuit reaffirmed *Zuniga* and ruled that mere receipt of a gun in a drug tran-

saction constituted "use" of a firearm during and in relation to a drug trafficking crime. *Ulloa*, 94 F.3d at 956.

Chief Judge Politz dissented. He distinguished bartering *with* a firearm, conduct that *Smith* and *Bailey* described as within 18 U.S.C. § 924(c)(1)(A), from bartering *for* a firearm. With respect to the latter, the dissent argued that the panel opinion misapplied *Bailey* and ignored its central holding: "*Bailey* clearly requires 'active employment' of the firearm. In the case at bar, however, the firearm was exclusively the passive object of [the defendant's] actions." *Ulloa*, 94 F.3d at 958. The dissent would have held that, without more, bartering for and receiving a firearm in exchange for drugs does not constitute "use" of a firearm during and in relation to a drug trafficking offense. *Ibid.*

In this case, as in *Zuniga* and *Ulloa*, petitioner merely received a gun as payment in a drug transaction. App., *infra*, 9a. Accordingly, the Fifth Circuit determined that it was bound by *Ulloa* and therefore affirmed petitioner's conviction. This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Courts Of Appeals Are Divided As To Whether Receipt Of A Firearm In Exchange For Drugs Constitutes "Use" Within The Meaning Of 18 U.S.C. § 924(c)(1)(A)

As the government acknowledged below, "there is a split in the circuits" regarding whether an individual who receives a firearm in exchange for drugs "uses" that firearm within the meaning of 18 U.S.C. § 924(c)(1)(A). Gov't C.A. Br. 17. The First, Third, Fourth, Fifth, Eighth, and Ninth Circuits consider such receipt to be "use" under § 924(c)(1)(A). The Sixth, Seventh, Eleventh, and D.C. Circuits do not.

This Court addressed the meaning of "use" under 18 U.S.C. § 924(c)(1) in *Bailey* v. *United States*, 516 U.S. 137

(1995). *Bailey* held that "use" means "*active employment* of the firearm." *Id.* at 143. The Court emphasized that the term "use" must be given its "'ordinary or natural' meaning," which "impl[ies] action and implementation." *Id.* at 145. The Court rejected an interpretation of "use" that was "virtually synonymous with 'possession.'" *Id.* at 150.

Since *Bailey*, four circuits have held that mere receipt of a firearm in exchange for drugs is not "use" of the firearm under 18 U.S.C. § 924(c)(1)(A). Those courts have determined that receipt of a firearm is a passive act that does not meet the "active employment" requirement of *Bailey*. See *United States* v. *Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005) ("[The defendant] did not violate § 924(c) by trading methamphetamine for firearms."); *United States* v. *Stewart*, 246 F.3d 728, 731 (D.C. Cir. 2001) ("[W]e cannot see how a defendant 'uses' a gun when he receives it during a drug transaction."); *United States* v. *Warwick*, 167 F.3d 965, 975 (6th Cir. 1999) ("[P]assive receipt of [a] shotgun * * * in exchange for marijuana did not constitute a 'use' of the firearm * * *."); *United States* v. *Westmoreland*, 122 F.3d 431, 435 (7th Cir. 1997) ("[P]assively receiving a gun * * * in payment for drugs cannot constitute a use * * *.").

The difference between trading drugs for a firearm and trading a firearm for drugs, those courts have further explained, is that the defendant "did not bargain *with* his firearm, he bartered drugs in order to obtain that firearm." *Montano*, 398 F.3d at 1283. Just as a person who "pays a cashier a dollar for a cup of coffee in the courthouse cafeteria" has not "used" the coffee, a person who "pays for a gun with drugs" has not "used" the firearm. *Stewart*, 246 F.3d at 731. Simply put, "[a] seller does not 'use' a buyer's consideration." *Westmoreland*, 122 F.3d at 436; see also *United States* v. *Patterson*, 215 F.3d 776, 783 (7th Cir. 2000) ("Using drugs as currency to buy guns does not 'use' the guns.").

Six circuit courts have reached the opposite conclusion, holding that receipt of a firearm in exchange for drugs does constitute "use" of the firearm within the meaning of 18 U.S.C. § 924(c)(1)(A). See *United States* v. *Cotto*, 456 F.3d 25 (1st Cir. 2006); *United States* v. *Sumler*, 294 F.3d 579, 583 (3rd Cir. 2002); *United States* v. *Ramirez-Rangel*, 103 F.3d 1501 (9th Cir. 1997); *United States* v. *Ulloa*, 94 F.3d 949, 956 (5th Cir. 1996); *United States* v. *Cannon*, 88 F.3d 1495 (8th Cir. 1996); *United States* v. *Harris*, 39 F.3d 1262 (4th Cir. 1994).

In the view of those courts, trading firearms for drugs and trading drugs for firearms "is a distinction without a difference," and thus, under *Smith* v. *United States*, 508 U.S. 223 (1993), both situations constitute "use" of the firearm under § 924(c)(1)(A). *Cannon*, 88 F.3d at 1509; see also *United States* v. *Weekes*, 2000 WL 750544, at *1 (9th Cir. 2000) (unpublished) (holding that the distinction between trading drugs for firearms and trading firearms for drugs was "meaningless"). The courts emphasize the decision in *Smith* and downplay *Bailey*'s more recent emphasis on the "ordinary or natural meaning" of "use." *Cannon*, 88 F.3d at 1508-1509; *Ramirez-Rangel*, 103 F.3d at 1506.

The First Circuit recently acknowledged the depth and currency of the split, observing that the position taken by the Sixth, Seventh, Eleventh, and D.C. Circuits is "not without merit," because it is "less natural" to say that receipt of a firearm is "use" of the firearm. *Cotto*, 456 F.3d at 28. Were it "writing on a blank slate," the First Circuit confessed, it "might well be inclined" to join those four circuits in holding that, "based on the most natural reading of the statute[, a defendant does] not 'use' the guns by bartering for them." *Ibid.*

The First Circuit held otherwise, however, because it felt constrained by *Smith*. See *Cotto*, 456 F.3d at 28 ("*Smith* controls here."). Like five other circuits, it held that nothing in *Bailey* "compels us to distinguish *Smith*" and its "broad

understanding of what it means for a firearm to be 'used.'" *Id.* at 28–29. To the extent those circuits squarely confront *Bailey*, they focus on this Court's mention of "bartering" as an example of "active employment." *Bailey*, 516 U.S. at 148. Those courts interpret that language in *Bailey* to mean that bartering drugs for a firearm actively employs the firearm, since, in that trade, the firearm is "'an operative factor in relation to the predicate offense.'" *Ulloa*, 94 F.3d at 956; see also *United States* v. *Rogers*, 150 F.3d 851, 858 (8th Cir. 1998).

* * *

In sum, in the First, Third, Fourth, Fifth, Eighth, and Ninth Circuits, an individual may be convicted of violating 18 U.S.C. § 924(c)(1)(A) based on the mere receipt of a firearm in exchange for drugs. The Sixth, Seventh, Eleventh, and D.C. Circuits have reached exactly the opposite conclusion. Thus, as the United States acknowledged below, this question has squarely and deeply divided the courts of appeals. This Court's intervention is necessary to resolve this split and to provide uniform guidance to defendants, prosecutors, and judges on this important issue.

II. The Fifth Circuit's Rule Conflicts With The Plain Meaning Of "Use" And This Court's Decision In *Bailey*

A. The Plain Meaning Of "Use" Does Not Include Mere Receipt Of A Firearm

This Court's intervention is also necessary to correct the fundamental misunderstanding that the term "use" includes mere receipt of a firearm in exchange for drugs. Where a statute does not define a particular term, interpretation starts with the term's ordinary meaning. *Smith*, 508 U.S. at 228 (citing *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)). Under the ordinary meaning of "use," a firearm is not "used" whenever it is merely received in a drug transaction.

The standard dictionary definitions of use set forth in *Smith*, 508 U.S. at 228–229, do not encompass receipt of a firearm. For example, by receiving a firearm in exchange for drugs, the recipient has not "employed" the firearm or "derived service" from it. Cf. *id.* at 229 (explaining that a defendant who trades a gun for drugs has used the gun under § 924(c)(1) because he has "derived service" from the gun). The recipient has acquired and obtained the firearm, but in no sense has the recipient actually made use of the firearm.

As the Seventh Circuit explained, the plain meaning of the term "use" cannot bear the strained reading necessary to encompass mere receipt:

> If [the government agent] had paid for the gun with a $100 bill, we would not say that [the defendant] 'used' $100 in selling his gun to [the other party to a transaction]. A seller does not "use" a buyer's consideration. The only person actively employing the gun in this transaction is the government agent.

Westmoreland, 122 F.3d at 435–436. Indeed, even the Third Circuit, which ultimately misread *Smith* and *Bailey* to reach the opposite conclusion, recognized the logic of the Seventh Circuit's textual analysis: "The *Westmoreland* Court advanced a forceful argument in declaring 'there is no grammatically correct way to express that a person received a payment is thereby "using" the payment.'" *Sumler*, 294 F.3d at 583 (quoting *Westmoreland*, 122 F.3d at 435). Those courts that understand "use" of a firearm during and in relation to a drug trafficking crime to encompass bartering with drugs for a firearm have ignored the term's ordinary meaning.

B. The Fifth Circuit's Rule Conflicts With This Court's Decision In *Bailey*

1. The sharp conflict among the courts of appeals (*supra*, pp. 7-10) reflects their confusion in applying this Court's decision in *Bailey*. In that case, the defendants were convic-

ted of "use" of a firearm under § 924(c)(1) for possessing firearms in the vicinity of a drug trafficking offense. This Court unanimously reversed the convictions and demarcated the scope of the § 924(c)(1) use offense: "To sustain a conviction under the 'use' prong of § 924(c)(1), the Government must show that the defendant actively employed the firearm during and in relation to the predicate crime." 516 U.S. at 150. The Court explained that no active employment occurred if the purported use constituted some passive function performed by the firearm in the drug trafficking transaction. *Id.* at 148–149. Instead, active employment meant use of the firearm that "makes the firearm an operative factor in relation to the predicate offense." *Id.* at 143.

Despite that language, several courts of appeals have relied upon *Bailey* to justify interpreting § 924(c)(1)(A) to include mere receipt of a gun in exchange for drugs. Those courts have viewed as controlling *Bailey*'s inclusion of "bartering" on an illustrative list of conduct constituting active employment of a firearm. See *Cotto*, 456 F.3d at 29; *Sumler*, 294 F.3d at 582; *Ulloa*, 94 F.3d at 955; *Cannon*, 88 F.3d at 1509. To be sure, this Court stated in *Bailey* that "[t]he active-employment understanding of 'use' certainly includes brandishing, displaying, *bartering*, striking with, and, most obviously, firing or attempting to fire a firearm." 516 U.S. at 148 (emphasis added). But it is clear that those courts misunderstood this language to refer to both bartering *with* a firearm for drugs, the situation actually addressed in *Smith* and referred to in *Bailey*, and bartering with drugs *for* a firearm, the scenario presented here.

The inclusion of bartering on that list of examples of use immediately follows the Court's statement that *Bailey* did not abrogate the holding of *Smith*. *Bailey*, 516 U.S. at 148. In *Smith*, this Court held that a defendant who bartered *with* his firearm in exchange for drugs "used" the firearm within the meaning of § 924(c)(1): "By attempting to trade his MAC-10 for the drugs, [the defendant] 'used' or 'employed' it as an

item of barter to obtain cocaine; he 'derived service' from it because it was going to bring him the very drugs he sought." 508 U.S. at 229.[1]

In affirming the result in *Smith*, *Bailey* did not purport to hold that every instance of barter violated the statute; rather, read in context, *Bailey*'s illustrative list included only the conduct of bartering *with* a firearm. See *Stewart*, 246 F.3d at 732 ("The Supreme Court included 'bartering' in a list of examples of active employments that might fall within § 924(c)(1) definitions of 'use.' The Supreme Court did not purport to be encompassing every possible situation involving barter as a violation of the statute."). Moreover, elsewhere in *Bailey*, this Court made it clear that its mention of "bartering" referred to bartering *with* a firearm. See 516 U.S. at 146 ("Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters *with* a firearm without handling it.") (emphasis added). Thus, those courts that treat *Bailey* as allowing § 924(c)(1)(A) to encompass bartering *for* a firearm by exchanging drugs fundamentally misread that decision.

Those courts also fail to appreciate *Bailey*'s rejection of inherently passive conduct (there, mere possession of a firearm) as constituting "use" within the meaning of § 924(c)(1)(A). As the Court explained, "[p]erhaps the non-active nature of this asserted 'use' is clearer if a synonym is used: storage." *Bailey*, 516 U.S. at 149. Likewise, in this case, the nonactive nature of the defendant's conduct becomes clear when "use" is replaced by a more accurate

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[1] In dissent, Justice Scalia, joined by Justices Stevens and Souter, lamented the majority's decision to stray from "our rule that ordinary meaning governs" by expansively interpreting "use a firearm" beyond its reasonably implicit meaning. *Smith*, 508 U.S. at 244. The dissent would instead have limited the meaning of use in § 924(c)(1) to use of the firearm for its intended purpose as a weapon. *Id.* at 242.

synonym: receipt. When a person receives a firearm in exchange for drugs, he has engaged in only passive conduct. He has not actively employed the firearm by receiving it, and, under *Bailey*, he has not used the firearm.[2]

2. Congress demonstrated its agreement with *Bailey*'s reasoning that "use" under § 924(c)(1)(A) includes only "active employment." Shortly after this Court's decision in *Bailey*, Congress amended the language of § 924(c)(1) to criminalize possession of a firearm "in furtherance" of a drug trafficking offense. Displeased with the result in *Bailey*, but apparently not with this Court's interpretation of the statutory term "use," Congress simply added the "possession in furtherance" prong to § 924(c)(1) to reach the type of conduct at issue in *Bailey* and similar cases—namely, "situations

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[2] This Court has in other circumstances recognized the distinction between active and passive conduct, choosing to characterize simple receipt as passive. In *McDonald* v. *Williams*, 174 U.S. 397 (1899), this Court considered whether bank shareholders' receipt of a dividend violated Revised Statutes § 5204, which provided that "[n]o association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital." Unbeknownst to the shareholders, the dividends paid to them in certain years came out of the bank's capital because the bank had failed to produce net profit in those years. The bank's receiver sued to recover the dividends from the shareholders under § 5204. In ruling for the shareholders, this Court interpreted § 5204 to require "some positive or affirmative act on the part of the shareholder." *Id.* at 406. In keeping with the "positive or affirmative act" required under § 5204, this Court held that Congress did not intend the statute "to include the case of the *passive receipt* of a dividend by a shareholder in the *bona fide* belief that the dividend was paid out of profits." *Ibid.* (emphasis added). *McDonald* provides an apt analogy to the drugs-for-gun transaction at issue in this case. Just as the Court characterized the stockholders' receipt of a dividend (received in exchange for their capital investment) as passive, a defendant's receipt of a firearm (as consideration for the drugs he provides) is likewise an inherently passive act.

where a defendant kept a firearm available to provide security for the transaction, its fruit or proceeds, or was otherwise emboldened by its presence in the commission of the offense." 144 Cong. Rec. S12670 at S12671 (statement of Sen. DeWine). The amendment did not purport to disturb *Bailey*'s holding that a defendant charged under the "use" prong of § 924 must "actively employ" the firearm in a drug trafficking offense.

Congress's decision not to disturb the "use" prong appears to have been deliberate. An early House version of the revised statute sought to excise the phrase "uses or carries" altogether and to replace that language with a tiered approach criminalizing possession, brandishing, or discharge of a firearm during and in relation to a crime of violence or drug trafficking crime. H.R. 424, 105th Cong. (1997). The Senate version, however, retained the "uses or carries" language and added new possession language. S. 191, 105th Cong. (1997); see also Angela LaBuda Collins, Note, *The Latest Amendment to 18 U.S.C. § 924(c): Congressional Reaction to the Supreme Court's Interpretation of the Statute*, 48 Cath. U. L. Rev. 1319 (1999). Congress ultimately agreed to compromise legislation retaining "use" as a separate category and adding a separate possession in furtherance offense, which passed both houses in October 1998. See Pub. L. 105-386, 112 Stat. 3469 (1998).

In the House, the new provision was justified as a way to punish "severely" those "criminals who carry guns while committing serious crimes." 144 Cong. Rec. H10329 (statement of Rep. McCollum). While praising the amendment as "a critical tool in our fight against gun-toting criminals," Representative McCollum cautioned that "this bill will not affect any person who merely possesses a firearm in the general vicinity of a crime." *Id.* at H10330.

In the Senate, proponents also hailed the passage of this legislation, which would "provide enhanced mandatory mini-

mum penalties for those criminals who *use* guns while trafficking in drugs." 144 Cong. Rec. S12670 (statement of Sen. DeWine) (emphasis added). As Senator DeWine explained, the 1998 amendment sought to address the issue of "constructive possession" of firearms. *Ibid.* Senator DeWine further explained the significance of the "in furtherance" standard. He noted that the addition of this modifier was intended to impose "a slightly higher standard that encompasses 'during and in relation to' language, by requiring an indication of helping forward, promote, or advance a crime." 144 Cong. Rec. S12671 (statement of Sen. DeWine).

This understanding is also reflected in the House Report that accompanied that chamber's version of the legislation. See H.R. Rep. No. 105-344. The House Judiciary Committee acknowledged the subtle distinction between the "during and in relation to" and "in furtherance of" standards, noting that the latter was "a slightly higher standard." *Id.* at 11. In the Committee's words, "[t]he Government must clearly show that a firearm was possessed to advance or promote the commission of the underlying offense. The mere presence of a firearm in an area where a criminal act occurs is not a sufficient basis for imposing this particular mandatory sentence." *Id.* at 12. In fact, according to the Committee Report, facts like those alleged in *Bailey* "may be insufficient to meet the 'in furtherance test.'" *Ibid.*

Thus, when Congress set about to address the result of *Bailey*, it did not purport to disturb this Court's definition of "use" as requiring active employment. To the contrary, Congress carefully avoided any suggestion that would transform the mere presence of a gun near a drug transaction into an offense carrying the stiff penalties mandated by § 924(c)(1)(A).

III. The Decision Below Presents A Recurring Issue Of National Significance

1. As evidenced by the depth of the split among the lower courts, this question has arisen repeatedly since *Bailey*. See *Cotto*, 456 F.3d 28; *Watson*, App., *infra*, 1a-2a; *Montano*, 398 F.3d at 1282-1284; *United States* v. *Short*, 55 Fed. App'x 183 (4th Cir. 2003) (unpublished); *Sumler*, 294 F.3d at 580; *Stewart*, 246 F.3d at 731-733; *Warwick*, 167 F.3d at 975-976; *Westmoreland*, 122 F.3d at 434-436; *Ramirez-Rangel*, 103 F.3d at 1506; *Ulloa*, 94 F.3d at 955-956; *Cannon*, 88 F.3d at 1508-1509; *Zuniga*, 18 F.3d at 1258; *United States* v. *Sanchez*, 2006 WL 472739 (D. Utah 2006) (unpublished); *United States* v. *Trotter*, 2005 WL 2239479 (D. Kan. 2005) (unpublished). Indeed, as the decision below and the First Circuit's recent decision in *Cotto* reveal, the issue is one of immediate and continuing concern in the lower courts.

The frequency with which this issue arises is not surprising. More than one out of every ten convictions of a federal drug offense involves a sentence enhanced for use of a firearm (be it under the Sentencing Guidelines or the mandatory 60-month consecutive minimum sentence required by § 924(c)). U.S. Dep't of Justice, Bureau of Justice Statistics, Federal Drug Offenders, 1999 with Trends 1984–99, at 10. Prosecutors may forgo or dismiss a § 924(c)(1)(A) enhancement in exchange for a negotiated guilty plea and Guidelines enhancement, see Memorandum from Att'y Gen. John Ashcroft to All Federal Prosecutors (Sept. 22, 2003), but the option to seek the sentencing enhancement mandated by a § 924(c) conviction is frequently available.

2. This issue is particularly significant because a conviction under § 924(c)(1)(A) subjects defendants to significant mandatory imprisonment that must be served consecutively to any other sentence imposed. See 18 U.S.C. § 924(c)(1)(A)(i), (c)(1)(D). As a result, in jurisdictions that recognize a drugs-for-gun transaction as "use" of a firearm

during and in relation to a drug trafficking offense, conviction under § 924(c)(1)(A) would compel the sentencing court to impose a minimum consecutive term of five years above and beyond the sentence imposed for the predicate drug trafficking offense. In contrast, in jurisdictions that do not equate mere receipt with use, a defendant convicted of the underlying drug trafficking crime would face at most a two-level enhancement in the base offense level under the Sentencing Guidelines. See U.S.S.G. § 2D1.1(b)(1). The consequences of such an enhancement are thus much less severe than the mandatory consecutive five-year minimum sentence resulting from a § 924(c)(1)(A) conviction, particularly since *United States* v. *Booker*, 543 U.S. 220 (2005), rendered the Guidelines only advisory.

The significance of a conviction under § 924(c)(1)(A) is even more pronounced where, as here, a defendant qualifies as a career offender under Sentencing Guidelines § 4B1.1(a).[3] For career offenders, a conviction under § 924(c)(1)(A) for trading drugs for a gun generally requires a minimum sentence of 262–327 months. See U.S.S.G. § 4B1.1(c)(2) (establishing the minimum sentence for a career offender conviction that includes using a firearm during and in relation to a drug trafficking offense). In petitioner's case, the impact of the § 924(c)(1)(A) conviction was particularly acute. As a career offender under Counts I and III of the indictment, the probation officer calculated that the Sentencing Guidelines recommended a sentence of 151–188 months. PSR ¶ 84.

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[3] Sentencing Guidelines § 4B1.1(a) provides the qualifications for sentencing as a career offender:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Sentencing Guidelines § 4B1.1(a).

With the addition of petitioner's § 924(c)(1)(A) conviction, however, the Guidelines recommended a sentence of 262–327 months, an increase in the minimum sentence of 111 months. Thus, had petitioner engaged in the exact same transaction in a jurisdiction that does not recognize mere receipt of a gun as "use" under § 924(c)(1)(A), his sentence could have been nearly ten years shorter.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2006

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-31094
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL A. WATSON

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
(3:04-CR-186-ALL)

Before KING, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Michael A. Watson appeals his guilty-plea conviction for use of a firearm during and in

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

relation to a drug trafficking crime, a violation of 18 U.S.C. § 924(c)(1)(A). Watson traded a quantity of drugs to an undercover agent in exchange for a handgun. Watson specifically reserved the right to appeal whether this factual basis was sufficient to support his conviction for use of a firearm under the statute.

Watson acknowledges our decisions in *United States v. Zuniga*, 18 F.3d 1254 (5th Cir. 1994), and *United States v. Ulloa*, 94 F.3d 949 (5th Cir. 1996), but he argues that these decisions are distinguishable and thus not controlling. He asserts that, in his case, government agents first proposed trading drugs for the handgun, that he controlled the handgun for only moments before his arrest, and that he could not have used the handgun because it was unloaded. We conclude, however, that nothing in *Zuniga* or *Ulloa* suggests that any of these factors are material to the determination of "use" or otherwise render those cases distinguishable.

Watson also asks us to "reconsider" *Zuniga* and *Ulloa* in light of contrary decisions from other circuits. "It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision." *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999).

AFFIRMED.

APPENDIX B

AO 245B (Rev. 03/01) Judgment in a Criminal Case
Sheet 1

United States District Court
Middle District of Louisiana

UNITED STATES OF AMERICA
v.
MICHAEL A. WATSON

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November, 1987)
Case Number: 3:04CR00186-001

Karl J. Koch
Defendant's Attorney

THE DEFENDANT:

[√] pleaded guilty to count(s): I, II and III of the Indictment.

[ ] pleaded nolo contendere to counts(s) ___ which was accepted by the court.

[ ] was found guilty on count(s) ____ after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)

See next page.

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on counts(s) ___ and is discharged as to such count(s).

[ ] Counts ___ is/are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and US Attorney of any material change in the defendant's economic circumstances.

November 17, 2005
Date of Imposition of Judgment

/s/
Signature of Judicial Officer

FRANK J. POLOZOLA,
United States District Judge
Name & Title of Judicial Officer

11/29/05
Date

AO 245B (Rev. 03/01) Judgment in a Criminal Case
Sheet 1A

CASE NUMBER: 3:04CR00186-001
DEFENDANT: MICHAEL A. WATSON

Title & Section	**Nature of Offense**	**Date Offense Concluded**	**Count Number(s)**
21 U.S.C. §841(a)(1)	Distribution of Oxycodone Hydrochloride	November 12, 2004	I
18 U.S.C. §924(c)(1)(A)	Use of a Firearm During and In Relation to a Drug Trafficking Crime	November 12, 2004	II
18 U.S.C. §922(g)(1)	Possession of a Firearm by a Convicted Felon	November 12, 2004	III

AO 245B (Rev. 03/01) Judgment in a Criminal Case
Sheet 2 – Imprisonment

CASE NUMBER: 3:04CR00186-001
DEFENDANT: MICHAEL A. WATSON

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 202 months on Count One, and 120 months on Count Three, to run concurrently. The defendant is also sentenced to 60 months on Count Two, to run consecutively to Counts One and Three, resulting in a total sentence of 262 months.

[√] The court makes the following recommendations to the Bureau of Prisons:
While in the custody of the Bureau of Prisons, the defendant shall be placed in a facility where he can receive mental health treatment, alcohol treatment and medical treatment.

[√] The defendant is remanded to the custody of the United States Marshal.

* * * * *

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	:	
	:	
versus	:	CRIMINAL NO.
	:	04-186-B-M3
MICHAEL A. WATSON	:	

PLEA AGREEMENT

1.

The Office of the United States Attorney for the Middle District of Louisiana, through undersigned counsel, and the above-named defendant agree that the defendant will enter pleas of guilty to an Indictment charging in Count One, distribution of oxycodone hydrochloride; Count Two, use of a firearm during and in relation to a drug trafficking crime; and Count Three, possession of a firearm by a convicted felon, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, 924(c)(1)(A), and Sections 922(g)(1).

* * * * *

9.

The defendant reserves his right to appeal the sufficiency of the factual basis presented during his re-arraignment to support a violation of Title 18, U.S.C. § 924(c)(1)(A) as well as: (a) any punishment imposed in excess of the statutory maximum; (b) any punishment which is an upward departure pursuant to the guidelines; and (c) any punishment which is above the guidelines range calculated by the Court. Except for the above reservation, the defendant hereby expressly waives the right to appeal his conviction and sentence,

including any appeal right conferred by Title 18, United States Code, Section 3742, and to challenge the conviction and sentence in any post-conviction proceeding, including a proceeding under Title 28, United States Code, Section 2255. Nothing in this paragraph shall act as a bar to the defendant perfecting any legal remedies he may otherwise have on appeal or collateral attack respecting claims of ineffective * * * assistance of counsel.

* * * * *

11.

The United States and the defendant further agree that should the Court, at the time of sentencing, find that, pursuant to Section 3E1.1(a), United States Sentencing Guidelines, the defendant qualifies for a two level decrease in offense level for acceptance of responsibility, and prior to the operation of Section 3E1.1(a) the defendant's offense level is 16 or greater, the United States will move the Court pursuant to Section 3E1.1(b), United States Sentencing Guidelines, to decrease defendant's offense level by one additional level for acceptance of responsibility.

12.

The United States and the defendant stipulate, pursuant to Section 6B1.4 of the United States Sentencing Guidelines, to the following facts:

> In November 2004, law-enforcement agents assigned to the Ascension Parish Sheriff's Office and the Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, were investigating the defendant's drug trafficking and firearm related activities in the Middle District of Louisiana. During the course of this investigation, law-enforcement agents were assisted by a confidential informant.

Sometime during the week of November 1, 2004, the defendant told the informant that he wished to purchase a firearm to protect himself against robbers. On or about November 8, 2004, the defendant asked the informant how much would the firearm cost, the informant replied that he did now know, but the firearm dealer would be willing to exchange narcotics for a firearm. After hearing this, the defendant told the informant that the defendant would be willing to trade narcotics for a firearm. On or about November 10, 2004, the informant told the defendant that he had an IMI Desert Eagle available to sell in exchange for narcotics.

On or about November 12, 2004, the confidential informant and an undercover agent met the defendant outside the latter's residence in Sorrento, Louisiana. While at that location, the defendant exchanged twenty four (24) dosage units of oxycodone hydrochloride, also known as OxyContin, for an Israeli Military Industries (I.M.I.), Desert Eagle, .50 caliber semi-automatic pistol, bearing serial number 31200803, manufactured in Israel. After this exchange, agents apprehended the defendant and found the firearm in the defendant's vehicle.

After having been advised of his *Miranda* rights, the defendant gave agents his permission to search his residence. Among the items found during the search of the defendant's residence were: (a) approximately eighteen (18) dosage units of oxycodone, also known as OxyContin; (b) approximately twenty nine (29) tablets of alprazolam, also known as Xanax; (c) approximately thirty (30) tablets of hydrocodone, also known as Lorcet; (d) a scale; (e) a Ruger, Model 10/22, .22 caliber semi-automatic rifle, bearing serial number 236-06166, manufactured in Newport, New Hampshire; (f) a Ruger, Model 10/22, .22 caliber

semi-automatic rifle, bearing serial number 249-27029, manufactured in Newport, New Hampshire; (g) a Winchester, Model 67, .22 caliber single shot rifle, manufactured in New Haven, Connecticut; (h) a Winchester, Model 37, 16 gauge single-shotgun, manufactured in New Haven, Connecticut; (i) a Bryco, Model 48, .380 caliber semiautomatic pistol, bearing serial number 559071, manufactured in Gardena, California; (j) approximately 120 rounds of unknown brand .45 caliber ammunition; (k) approximately 100 rounds of Winchester brand 9 mm. ammunition; (l) approximately 200 rounds of Aguila brand .22 caliber long rifle ammunition; (m) approximately 188 rounds of Remington brand .22 caliber short ammunition; (n) approximately 42 rounds of Remington brand .32 caliber ammunition; and (o) approximately 48 rounds of Remington brand .45 caliber ammunition.

The firearms found at the defendant's residence were designed and capable of discharging a projectile by the action of an explosive.

The defendant informed law-enforcement agents that he had prescriptions for the controlled substances found at this residence. The defendant added that he had two prior convictions for felony drug offenses. He told law-enforcement agents that he owned a Colt .45 caliber semiautomatic pistol and a Glock 9 mm. semiautomatic pistol which had been stolen from his residence. The defendant told officers that on a number of occasions he had been robbed and that individuals had stolen firearms, narcotics, and money from his residence. He informed law-enforcement agents that he was poor and that on a number of occasions he sold some of his prescribed controlled substances to raise extra cash. The defendant told agents that he purchased the Desert Eagle .50 caliber

semiautomatic pistol as a means to protect his other firearms and drugs from robbery and theft.

The defendant has two earlier convictions for felony offenses. He was convicted in the 19th Judicial District, East Baton Rouge, Parish, Louisiana, under Docket No. 2-85-23, for distribution of cocaine, in violation of Louisiana Revised Statutes 40:967(A), a felony. The defendant's second conviction arose in the 23rd Judicial District Court, Ascension Parish, Louisiana, under Docket No. 2568, for distribution of cocaine, in violation of Louisiana Revised Statutes 40:967(A), a felony. Following his release from imprisonment under the aforementioned docket numbers, on or about October 12, 1994, and continuing until May 24, 1998, the defendant was on parole, under the supervision of the Division of Probation and Parole, Louisiana Department of Public Safety and Corrections.

The defendant understands that the Court is not bound by this stipulation.

* * * * *

This Plea Agreement is entered into this 3 day of March 2005, at Baton Rouge, Louisiana.

* * * * *

Supreme Court, U.S.
FILED
JAN 25 2007
OFFICE OF THE CLERK

No. 06-571

In the Supreme Court of the United States

MICHAEL A. WATSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's receipt of a firearm in exchange for drugs constituted "use" of a firearm under 18 U.S.C. 924(c)(1).

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In the Supreme Court of the United States

No. 06-571

MICHAEL A. WATSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted in 191 Fed. Appx. 326.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2006. The petition for a writ of certiorari was filed on October 23, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Louisiana, petitioner was convicted of distributing oxycodone hydrochloride, in violation of 21 U.S.C. 841(a)(1); using a firearm during and in relation to a drug trafficking

crime, in violation of 18 U.S.C. 924(c)(1)(A); and unlawfully possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 5a. He was sentenced to a total of 262 months of imprisonment. *Id.* at 6a. The court of appeals affirmed. *Id.* at 1a-2a.

1. As stipulated in the plea agreement, in November 2004, law enforcement officers, assisted by an informant, were investigating petitioner's drug trafficking and firearm activities. Pet. App. 8a. Petitioner had previously been convicted of two state felony offenses. *Id.* at 11a. Petitioner told the informant that he wished to purchase a firearm to protect himself against robbers. *Id.* at 9a. When petitioner asked the informant how much the firearm would cost, the informant replied that he did not know, but that his source would be willing to exchange the firearm for drugs. *Ibid.* Petitioner advised the informant that he would be willing to trade drugs for the firearm, and they arranged an exchange. *Ibid.*

On the day of the transaction, the informant and an undercover agent met petitioner outside petitioner's residence. Petitioner exchanged 24 dosage units of oxycodone hydrochloride for a "Desert Eagle" .50 caliber semi-automatic pistol. Pet. App. 9a. After the exchange, agents apprehended petitioner and found the pistol in his vehicle. *Ibid.* Law enforcement officers found additional firearms and controlled substances in a subsequent search of petitioner's residence. *Id.* at 9a-10a. Petitioner informed the agents that he had prescriptions for the controlled substances, and that he sometimes sold his prescribed drugs to raise extra cash. *Id.* at 10a. Petitioner also told the agents that he purchased the Desert Eagle pistol as a means to protect his drugs and his other firearms from theft. *Id.* at 10a-11a.

2. A grand jury in the United States District Court for the Middle District of Louisiana returned a three-count indictment charging petitioner with distributing oxycodone hydrochloride, in violation of 21 U.S.C. 841(a)(1); using a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and unlawfully possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 5a. Petitioner entered a conditional guilty plea based on stipulated facts, retaining his right to challenge the sufficiency of the factual basis for his conviction under Section 924(c)(1)(A). *Id.* at 7a. Section 924(c)(1)(A) imposes specified penalties on "any person who, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. 924(c)(1)(A).[1] Petitioner was sentenced to a total of 262 months of imprisonment, a term that included a 60-month consecutive sentence for the violation of Section 924(c)(1)(A). Pet. App. 6a.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-2a. Relying on its decisions in *United States* v. *Zuniga*, 18 F.3d 1254 (5th Cir.), cert. denied, 513 U.S. 880 (1994), and *United States* v. *Ulloa*, 94 F.3d 949 (5th Cir. 1996), cert. denied, 520 U.S. 1157 (1997), the court rejected petitioner's claim that his trade of a quantity of drugs to an undercover agent in exchange for a handgun did not constitute the "use" of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). The court of appeals concluded that the factors cited by

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[1] Only the "use" provision is directly at issue here. Petitioner was not indicted under the "carry" or "possession" prongs of the statute.

petitioner—that government agents first proposed trading drugs for the handgun, that petitioner controlled the handgun for only moments before his arrest, and that he could not have used the handgun because it was unloaded—were not material to the determination of "use" and did not distinguish *Zuniga* or *Ulloa*. Pet. App. 2a.

ARGUMENT

Petitioner contends (Pet. 7-14) that the court of appeals' opinion conflicts with a decision of this Court and decisions of other courts of appeals on whether obtaining a firearm in exchange for drugs constitutes "use" of a firearm under 18 U.S.C. 924(c)(1)(A). The decision below is correct; it does not conflict with any decision of this Court; and, to the extent that there is a circuit conflict on the issue, it is of minimal continuing importance. Further review of the court of appeals' unpublished per curiam opinion is not warranted.

1. In *Smith* v. *United States*, 508 U.S. 223 (1993), this Court held that a defendant who trades a firearm for drugs "uses" it during and in relation to a drug trafficking offense within the meaning of Section 924(c). The Court reasoned that use of a firearm "as an item of barter fall[s] within the plain language of § 924(c)(1), so long as the use occurs during and in relation to a drug trafficking offense." *Id.* at 240. In so holding, the Court looked to the manner in which "Congress employed the words 'use' and 'firearm' together * * * in § 924(d)(1), which deals with forfeiture of firearms." *Id.* at 234. The Court observed that Section 924(d) included offenses in which the firearm was used "as an item of barter or commerce," such as, *inter alia*, the "unlicensed receipt of a weapon from outside the State, in violation of § 922(a)(3)." *Id.* at 234 & n.*. In addition, the Court

"[saw] no reason why Congress would have intended courts and juries applying § 924(c)(1) to draw a fine metaphysical distinction between a gun's role in a drug offense as a weapon and its role as an item of barter; it creates a grave possibility of violence and death in either capacity." *Id.* at 240.

The Court reaffirmed *Smith* in *Bailey* v. *United States*, 516 U.S. 137 (1995). *Bailey* held that "use" of a firearm under Section 924(c)(1) means "active employment" of the firearm, such that "the firearm [is] an operative factor in relation to the predicate offense." *Id.* at 143. According to the Court, "Congress intended 'use' in the active sense of 'to avail oneself of.'" *Id.* at 150. The Court made clear that its decision in *Bailey* was "not inconsistent with *Smith*," observing that the "active-employment understanding of 'use' certainly includes," *inter alia*, "bartering," and that "use" encompasses "use as an item of barter." *Id.* at 148.

In light of *Smith* and *Bailey*, the court of appeals correctly affirmed petitioner's conviction. The receipt of a firearm in exchange for drugs constitutes use of the firearm during and in relation to a drug trafficking offense under Section 924(c). As the Eighth Circuit concluded in *United States* v. *Cannon*, 88 F.3d 1495 (1996), the fact "that *Smith* involved a defendant trading a gun for drugs, whereas Defendants in this case traded their drugs for guns," is "a distinction without a difference." *Id.* at 1509. Because selling drugs is as much a drug trafficking crime as buying drugs, and "'use' * * * includes * * * bartering," *Bailey*, 516 U.S. at 148, the conclusion in *Smith* applies equally to both situations. *Cannon*, 88 F.3d at 1509. As the First Circuit has explained, when *Smith* held that the use of a firearm as an "item of barter or commerce" fell within the coverage of

Section 924(c)(1), it "employed a very broad understanding" of the term and the Court's examples "included not only variations on delivery, but also multiple instances of receipt." *United States* v. *Cotto*, 456 F.3d 25, 28 (2006), petition for cert. pending, No. 06-8168 (filed Dec. 5, 2006); see *Cannon*, 88 F.3d at 1509 (noting, as did this Court in *Smith*, that "one 'uses' a firearm under § 924(d)(1) when one 'receives' a firearm in violation of § 922(a)(3)").

Contrary to petitioner's assertion (Pet. 11-14), the decision below is fully consistent with *Bailey*'s "active-employment understanding of 'use.'" 516 U.S. at 148. Petitioner initiated the request for a firearm, and he agreed to provide drugs in exchange for that firearm. Pet. App. 9a. Where a defendant trades drugs for a firearm, and accepts the firearm as a way of closing the drug transaction, "the firearm [is] an operative factor in relation to the predicate offense." *Bailey*, 516 U.S. at 143. Accord *Cotto*, 456 F.3d at 29; *United States* v. *Ulloa*, 94 F.3d 949, 956 (5th Cir. 1996) ("By bartering drugs for firearms, Ulloa 'actively employed' the firearms, because they were an 'operative factor' in the drug trafficking offenses: Ulloa required that he be furnished firearms in exchange for his drugs."), cert. denied, 520 U.S. 1157 (1997). Such a drugs-for-gun trade is a far cry from the "mere possession of a firearm by a person who commits a drug offense" that concerned the Court in *Bailey*. See 516 U.S. at 143.

The court of appeals' decision is also supported by the purpose of Section 924(c)(1)(A). As this Court recognized in *Smith*, when Congress enacted that provision, it "was no doubt aware that drugs and guns are a dangerous combination." 508 U.S. at 240. The Court observed that "[t]he fact that a gun is treated momen-

tarily as an item of commerce does not render it inert or deprive it of destructive capacity. Rather, as experience demonstrates, it can be converted instantaneously from currency to cannon." *Ibid.* As the First Circuit has explained, "[t]hat is so whether the defendant transfers or receives the gun." *Cotto*, 456 F.3d at 29.

2. Petitioner correctly notes (Pet. 7-10) that the courts of appeals disagree on whether trading drugs for a firearm constitutes the "use" of a firearm within the meaning of Section 924(c)(1)(A). In accordance with the decision here and the First and Eighth Circuit decisions cited above, the Third, Fourth, and Ninth Circuits have held that the trading of drugs for firearms is such use. See *United States* v. *Sumler*, 294 F.3d 579, 581-583 (3d Cir. 2002), cert. denied, 537 U.S. 1196 (2003); *United States* v. *Harris*, 39 F.3d 1262, 1269 (4th Cir. 1994) (supplying someone with drugs in exchange for aid in obtaining a firearm constitutes "use"); *United States* v. *Belcher*, No. 98-4845, 1999 WL 1080103, *1 & n.* (4th Cir. Nov. 29, 1999) (201 F.3d 437 (Table)) (per curiam) (holding that "[a]n exchange of drugs for guns constitutes 'use'"), cert. denied, 529 U.S. 1032 (2000); *United States* v. *Ramirez-Rangel*, 103 F.3d 1501, 1506 (9th Cir. 1997); cf. *United States* v. *Cox*, 324 F.3d 77, 84 (2d Cir.) (receiving drug purchaser's firearm as "collateral to secure future payment" constitutes active use during and in relation to a drug trafficking offense), cert. denied, 540 U.S. 854 and 859 (2003). A minority of circuits have concluded that a defendant does not "use" a firearm under Section 924(c)(1) when he receives it in exchange for drugs. See *United States* v. *Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005); *United States* v. *Stewart*, 246 F.3d 728, 731-732 (D.C. Cir. 2001); *United States* v. *Warwick*, 167 F.3d 965, 975-976 (6th Cir.), cert. denied, 526 U.S.

1151 (1999); *United States* v. *Westmoreland*, 122 F.3d 431, 435 (7th Cir. 1997).[2] For the reasons discussed above, the view of the majority of the circuits is correct.

In any event, the disagreement in the courts of appeals does not warrant this Court's review because a post-*Bailey* amendment to Section 924(c)(1) diminishes the practical significance of the issue. The version of Section 924(c)(1) in effect at the time *Bailey* was decided in 1995 encompassed any person who, "during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm." *Bailey*, 516 U.S. at 143 (quoting 18 U.S.C. 924(c)(1) (1994)). Congress extended the reach of Section 924(c)(1) in 1998 to prohibit not only the use or carrying of a firearm during and in relation to a drug trafficking crime, but also the *possession* of a firearm "in furtherance of a * * * drug trafficking crime." See Act of Nov. 13, 1998, Pub. L. No. 105-368, § 1(a)(1), 112 Stat. 3469. As a result, even in circuits that have held that obtaining firearms in exchange for drugs is not "use" in violation of Section 924(c)(1), an individual who trades drugs for firearms will generally be subject to prosecution and punishment

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[2] Two of those decisions, however, suggest that they are limited to their facts. See *Warwick*, 167 F.3d at 976 (holding that the defendant's "passive acceptance" of a gun from an undercover agent in exchange for drugs did not constitute "use," and distinguishing cases from other circuits where "the defendant was the one who actively devised the plan of providing drugs in exchange for firearms"); *Westmoreland*, 122 F.3d at 436 & n.1 (rejecting "use" "[w]here the defendant does nothing more than receive the gun in payment from a government agent," but suggesting that "[w]e might well have a different case had the transaction occurred between two defendants instead of between a government agent and a defendant" because the government "could conceivably charge the party receiving the gun with aiding and abetting the party supplying it").

under the amendment to Section 924(c)(1). As the Second Circuit observed in *Cox*, the circuit split on the issue thus "may dissipate without resolution," because "trading drugs for a gun will probably result in such possession" under the amended provision. *Cox*, 324 F.3d at 84 n.2.

That is precisely what has happened in the Sixth Circuit, which has held that "acquisition of a firearm in exchange for drugs is a sufficient 'specific nexus' between the drugs and the guns to constitute possession 'in furtherance of' the drug sale" under the amendment to Section 924(c)(1)(A). *United States* v. *Frederick*, 406 F.3d 754, 764 (2005). The Sixth Circuit explained that, "[a]s a matter of logic, a defendant's willingness to accept possession of a gun as consideration for some drugs he wishes to sell *does* 'promote or facilitate' that illegal sale." *Ibid.*[3] And, although petitioner contends (Pet. 17) that the question presented is "one of immediate and continuing concern in the lower courts," none of the post-amendment cases he cites holds that conduct such as petitioner's is outside the ambit of Section 924(c). See, *e.g.*, *Cotto*, 456 F.3d 27-30; *United States* v. *Sanchez*, No. 2:05CR205 TS, 2006 WL 472739, *1 (D. Utah Feb. 27, 2006) (unpublished) (holding that "trading drugs for a gun does constitute 'use' under § 924(c)");

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[3] Petitioner makes much (Pet. 14-16) of the fact that Congress extended the reach of the statute by adding a further prohibition instead of by revising this Court's interpretation of the term "use." As noted above, however, petitioner's conduct falls squarely within this Court's definition of "use." In any event, the amendment diminishes the need for this Court's review of the disagreement among the circuits about the scope of "use" in this context, because the possession amendment allows the fact-pattern presented in this case to be prosecuted in all circuits.

United States v. *Trotter*, No. CRIM.A.04-20140-02, 2005 WL 2239479, *3-*4 (D. Kan. Sept. 14, 2005) (unpublished) (holding, in the alternative, that the government presented sufficient evidence to support a conviction under either the "possession in furtherance of a drug trafficking offense" or the "use" prongs of Section 924(c)).[4]

Finally, even before the amendment to Section 924(c), there was little practical significance to the distinction between exchanging firearms for drugs and exchanging drugs for firearms. At least where the individual who supplies the drugs is not a government agent, the government generally could "charge the party receiving the gun with aiding and abetting the party supplying it." *Westmoreland*, 122 F.3d at 436 n.1. See *United States* v. *Price*, 76 F.3d 526, 529 (3d Cir. 1996) (explaining that 18 U.S.C. 2 "has been routinely applied in conjunction with section 924(c) to convict individuals of 'aiding and abetting in using and carrying a firearm'") (citing cases); *United States* v. *Hornaday*, 392 F.3d 1306, 1311-1314 (11th Cir. 2004) (discussing possible liability for aiding and abetting under 18 U.S.C. 2 for causing a government agent to do an act which would

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[4] In light of the decisions in *United States* v. *Zuniga*, 18 F.3d 1254 (5th Cir.), cert. denied, 513 U.S. 880 (1994), and *Ulloa* establishing the Fifth Circuit precedent that petitioner could, in the circumstances here, be charged with using the firearm in violation of Section 924(c)(1), he was not charged under the possession prong of the statute. The record shows that he did, albeit briefly, take possession of the Desert Eagle pistol after the transaction, however, and could have been charged under that prong of Section 924(c)(1). See Pet. App. 2a (noting petitioner's argument that "he controlled the handgun for only moments before his arrest"); *id.* at 9a (arresting agents "found the firearm in the defendant's vehicle").

have been criminal if performed by the defendant), cert. denied, 545 U.S. 1134 (2005).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

No. 06-571

In the Supreme Court of the United States

MICHAEL A. WATSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Respondent concedes (Opp. 7) that the courts of appeals are deeply and irreconcilably divided on the important question of federal law presented in this case: whether mere receipt of an unloaded firearm as payment for drugs constitutes "use" of the firearm within the meaning of 18 U.S.C. § 924(c)(1)(A). Nor does respondent dispute that this case, which arises from stipulated facts and a frequently recurring fact-pattern, presents an excellent vehicle to resolve this long-running and entrenched conflict.

Instead, respondent attempts to defeat review by urging: (1) that the significance of the 6-4 split has been "diminish[ed]" (Opp. 8) by Congress's addition in 1998 of a "possession-in-furtherance" prong to § 924(c)(1)(A) (which was not charged here and did not alter the definition of "use"), and by the purported "general" availability of aider-and-abettor liability (Opp. 10-11); and (2) that decisions like the one below, allowing those who receive firearms as a result of drug transactions to be punished for "using" them, are not inconsistent with this Court's decisions in *Smith* v. *United States*, 508 U.S. 223 (1993), and *Bailey* v. *United States*, 516 U.S. 137 (1995). Both of those assertions are mistaken.

First, far from "diminish[ing]" in the more than eight years since the amendment in question was enacted, the conflict over the meaning of "use" has broadened and solidified. That is hardly surprising considering that the provision Congress added in 1998 did not purport to address (and cannot be reasonably construed to reach) the circumstance at issue here. Congress amended § 924(c)(1)(A) to address the dangers posed by individuals who possess firearms "in *furtherance*" of a drug transaction; the amendment did not alter the meaning of "use" (as explicated by this Court's unanimous decision in *Bailey*), nor did Congress criminalize possession of firearms *as a result of* a drug transaction. To suggest otherwise defies the plain meaning and undisputed purpose of the amendment. And the

asserted "availability" of aiding and abetting liability is likewise a red herring: Respondent does not point to a single case in which a defendant who traded drugs for guns has been convicted on an aiding-and-abetting theory (even in those four circuits that have squarely rejected the "use" theory respondent defends here).

Second, respondent's suggestion that it is not necessary to resolve the conflict presented here because the decision below is correct is fundamentally misguided. It is difficult to see how receipt of an unloaded firearm from a government informant constitutes "active employment" of the firearm as required under *Bailey*. In any event, the undisputed fact is that four courts of appeals have squarely rejected respondent's strained reading of § 924(c)(1)(A) in the wake of *Bailey*, and it is for this Court (not the government) to resolve that dispute and give much-needed guidance to the lower courts.

I. Respondent Concedes A 6-4 Conflict Among The Circuits On The Important Question Of Federal Criminal Law Squarely Presented By This Case

As it did below (Gov't C.A. Br. 17), respondent expressly concedes that the federal courts of appeals are deeply divided on the question presented here. See Opp. 7 ("Petitioner correctly notes * * * that the courts of appeals disagree on whether trading drugs for a firearm constitutes the 'use' of a firearm within the meaning of Section 924(c)(1)(A).").

As explained previously (Pet. 7-10), the Fifth Circuit's decision in this case directly conflicts with decisions of the Sixth, Seventh, Eleventh, and D.C. Circuits, each of which has held that 18 U.S.C. § 924(c)(1)(A) – which provides for lengthy additional punishment for those who "use" a firearm during and in relation to a drug trafficking offense – does not extend to individuals like petitioner who receive a gun in exchange for drugs.[1] Those decisions rest on the

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[1] Respondent half-heartedly suggests (Opp. 8 n.2) that the decisions of the Sixth and Seventh Circuits might be limited to their facts. Both

unbridgeable gap between the ordinary and, after *Bailey*, well-settled meaning of the word "use" in § 924(c)(1)(A) (active employment) and the wholly passive act of mere receipt. Five other courts of appeals – the First, Third, Fourth, Eighth, and Ninth Circuits – have reached the contrary result, although two of those courts have confessed the awkwardness inherent in that construction. See *United States* v. *Cotto*, 456 F.3d 25, 28 (1st Cir. 2006) (explaining that, were it "writing on a blank slate," the court "might well be inclined" to join the courts holding "based on the most natural reading of the statute" that a defendant does not "use" firearms "by bartering for them"); *United States* v. *Sumler*, 294 F.3d 579, 583 (3d Cir. 2002) (acknowledging that the Seventh Circuit's decision in *United States* v. *Westmoreland*, 122 F.3d 431, 435 (1997), "advanced a forceful argument in declaring 'there is no grammatically correct way to express that a person receiving a payment is thereby "using" the payment'").

Moreover, respondent does not challenge the importance of the disputed statutory provision. See Pet. 17-19. A defendant convicted in any of the four circuits that treat receipt of a gun in a barter transaction as "use" of a firearm under § 924(c)(1)(A) faces a mandatory minimum sentence of at least five years, which must be served consecutively to the sentence for the underlying drug offense. See 18 U.S.C. § 924(c)(1)(A)(i), (c)(1)(D). For offenders with prior convic-

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courts, however, ruled broadly that mere receipt of a firearm is not "use" under § 924(c) because it does not constitute active employment of the firearm as required by *Bailey*. See *United States* v. *Warwick*, 167 F.3d 965, 976 (6th Cir. 1999); *United States* v. *Westmoreland*, 122 F.3d 431, 435 (7th Cir. 1997). Even the minimalist reading of those cases urged by respondent does not affect the conflict between those decisions and the one below. Indeed, the very facts highlighted by the Sixth and Seventh Circuits in holding the "use" provision inapplicable – namely, the significant role of a government informant in devising and consummating the charged transaction – were indisputably present in this case, and those facts did not deter the Fifth Circuit from affirming petitioner's conviction. See Pet. App. 1a, 2a.

tions (such as petitioner), the statute may have an even greater impact by virtue of the career offender enhancements prescribed by the federal sentencing guidelines. Here, simply because the events at issue took place in Ascension Parish, Louisiana, and not, say, a few hundred miles east in the Eleventh Circuit, petitioner received an additional *nine years'* imprisonment. Simply put, § 924(c)(1)(A) is of tremendous real-world significance to prosecutors and defendants alike, which further underscores the need for this Court to resolve the undisputed inconsistency in its interpretation and application.[2]

Finally, respondent does not contest that this case is an excellent vehicle for resolving this question. As respondent acknowledges (Opp. 3), petitioner's conviction arose from a conditional guilty plea upon stipulated facts, Pet. App. 8a-11a, to an indictment charging violation of only the "use" provision of § 924(c)(1)(A). Moreover, the underlying facts – a government agent/informant's active role in attempting to ensure that the underlying drug transaction could support a charge under § 924(c)(1)(A) – are fundamentally similar to those giving rise to decisions on both sides of the circuit split. See, *e.g.*, *United States* v. *Warwick*, 167 F.3d 965, 970 (6th Cir. 1999) (undercover officer claimed "he did not have enough money to pay for the marijuana * * * and offered to exchange [firearm] as partial payment").

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[2] Respondent does not dispute the evidence concerning the pervasiveness of these sentencing enhancements. See Pet. 17. Indeed, in the years 1992 to 1998, a total of 11,303 defendants received enhanced sentences under § 924(c)(1)(A). U.S. Dep't of Justice, Bureau of Justice Statistics, Federal Firearm Offenders, 1992-98, at 9 (2000). The government's propensity to seek such enhancements shows no sign of abating. The most recent data available show that in 2005 *alone*, 3,788 individuals received enhanced minimum sentences for weapons involvement (under either § 924(c)(1)(A) or a sentencing guidelines provision). See U.S. Sentencing Comm'n, 2005 Sourcebook of Federal Sentencing Statistics 102, 320.

II. The Significance Of The Conflict Is Not Mitigated By Congress's Addition Of The "Possession In Furtherance" Prong To § 924(c)(1)(A) Or By The Aiding-And-Abetting Statute

Unable to dispute the deep division among the courts of appeals, respondent labors to create the impression that this is the sort of 6-4 circuit split that may be safely ignored. To that end, respondent first points to a 1998 law Congress enacted in the wake of this Court's decision in *Bailey*. See Opp. 8-9. That enactment – which left undisturbed the "use" provision at issue in this case and in *Bailey* – amended § 924(c)(1)(A) to punish those "who, *in furtherance* of [a drug trafficking crime], possess[] a firearm." Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469 (emphasis added). Respondent also invokes the general "aiding and abetting" provision, 18 U.S.C. § 2, and asserts that it is "generally" available to prosecute those who trade drugs for weapons. In respondent's view, the disagreement among the circuits regarding whether receipt is "use" does not really matter because that conduct "generally" could be prosecuted under the amendment to § 924(c) or as aiding and abetting a § 924(c) offense. Opp. 8, 10. Respondent is mistaken on both counts.

1. For starters, the assertion that the amendment to § 924(c)(1)(A) diminished the significance of the conflict over "use" is contrary to real-world experience. In the more than eight years since Congress passed the amendment, the conflict has only widened and deepened. See, *e.g.*, *Cotto*, 456 F.3d 25; *United States* v. *Watson*, Pet. App. 1a (5th Cir. 2006) (unpublished); *United States* v. *Montano*, 398 F.3d 1276 (11th Cir. 2005); *United States* v. *Short*, 55 Fed. App'x 183 (4th Cir. 2003) (unpublished); *Sumler*, 294 F.3d 579; *United States* v. *Stewart*, 246 F.3d 728 (D.C. Cir. 2001); *Warwick*, 167 F.3d 965; *United States* v. *Belcher*, 1999 WL 1080103 (4th Cir. 1999) (unpublished); *United States* v. *Sanchez*, 2006 WL 472739 (D. Utah 2006) (unpublished); *United States* v. *Trotter*, 2005 WL 2239479 (D. Kan. 2005) (unpublished). As

this case and recent decisions by other courts demonstrate, there is indisputable evidence both that prosecutors continue to indict and prosecute defendants under the theory that receipt is "use," and that courts continue to disagree about the legitimacy of doing so.

It should come as no surprise that the 1998 amendment has had little impact on this issue, because Congress did not purport to change the law respecting drugs-for-firearms transactions. The amendment was aimed, instead, at the entirely different circumstance at issue in *Bailey*: a criminal who maintains a gun in proximity to a drug deal in order to embolden his participation in the transaction. The amendment, simply put, was designed to reverse the result in *Bailey*, not to disturb this Court's interpretation of the term "use."

The plain meaning of the language Congress enacted cannot be stretched to cover the circumstances at issue here. A firearm is not "possessed in furtherance" of a drug transaction when it is momentarily received simply *as a consequence* of the completed transaction. Just as "[a] seller does not 'use' a buyer's consideration," *Westmoreland*, 122 F.3d at 436, it is equally unnatural to say that a seller "possesses" a buyer's consideration "*in furtherance*" of a completed sale. For example, had the government informant here purchased drugs from petitioner with a $100 bill, it would defy ordinary understanding to describe petitioner as possessing the $100 bill "in furtherance of" the already-completed transaction. Indeed, where Congress specifically intends to refer to consideration received as payment in an illicit transaction, it employs language bearing little resemblance to the possession-in-furtherance provision upon which respondent relies here. See, *e.g.*, 18 U.S.C. § 982(a)(2) (requiring criminal forfeiture of "any property *constituting*, or *derived from*, *proceeds* the person obtained directly or indirectly, *as the result of* such violation") (emphasis added).

Accordingly, respondent's speculation that "an individual who trades drugs for firearms will *generally* be subject to

prosecution and punishment" and that "'trading drugs for a gun *will probably* result in'" prosecution for possession in furtherance, Opp. at 8–9 (quoting *United States* v. *Cox*, 324 F.3d 77, 83 n.2 (2d Cir. 2003) (emphasis added)), represents little more than wishful thinking. Courts have applied that provision almost exclusively in cases where a drug trafficker's possession of a gun promoted – in the ordinary and concrete, rather than the metaphysical, sense of the word – his illegal activity, *e.g.*, *United States* v. *Iiland*, 254 F.3d 1264, 1272-1273 (10th Cir. 2001), and most courts have developed multi-factor tests aimed at deciding that question.[3] Those standards, fairly applied to drugs-for-gun deals such as this one, would not yield the convictions respondent suggests are readily available.[4] Petitioner's momentary receipt of the

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[3] For example, courts typically instruct jurors to consider, among other factors, whether the firearm was loaded, how accessible the firearm was to the defendant, and the proximity of the firearm to drugs or proceeds. See *United States* v. *Ceballos-Torres*, 218 F.3d 409, 414-415 (5th Cir. 2000); see also *United States* v. *Lomax*, 293 F.3d 701, 705 (4th Cir. 2002); *United States* v. *Timmons*, 283 F.3d 1246, 1253 (11th Cir. 2002); *United States* v. *Wahl*, 290 F.3d 370, 376 (D.C. Cir. 2002); *United States* v. *Basham*, 268 F.3d 1199, 1206-1207 (10th Cir. 2001); *United States* v. *Mackey*, 265 F.3d 457, 462 (6th Cir. 2001).

[4] Respondent identifies a single decision that appears to embrace its peculiar view of the possession-in-furtherance prong (Opp. 9 (citing *United States* v. *Frederick*, 406 F.3d 754, 764 (6th Cir. 2005))), but that does not explain why the Seventh, Eleventh, and D.C. Circuits have not followed suit. Nor, in any event, is the Sixth Circuit's departure from the plain language and purpose of the 1998 amendment a sound basis for denying the need to review the question presented here, upon which 10 circuits are squarely divided.

In fact, several courts have recognized that Congress intended the phrase "in furtherance" to require more than that a firearm was somehow connected to a drug trafficking crime. See, *e.g.*, *United States* v. *Delgado-Hernandez*, 420 F.3d 16, 25 (1st Cir. 2005) ("[T]he 'in furtherance of' element of a firearm possession charge imposes a 'slightly higher standard' of liability than the nexus element corresponding to the different charges of using or carrying a firearm, which need only occur 'during and in relation to' the underlying

unloaded gun, handed to him by a government informant upon completion of the transaction, did not "further" anything. Indeed, as explained below, participation of government agents or informants appears to be the rule, rather than the exception, in § 924(c)(1)(A) prosecutions involving drugs-for-gun transactions. See *infra* pp. 8-9.

2. Respondent's attempt to enlist the aiding-and-abetting statute, 18 U.S.C. § 2, in service of its effort to minimize the conflict as to the meaning of "use" (Opp. 10) is even more ill-conceived. While respondent broadly claims that aiding-and-abetting charges are "routinely" brought in connection with § 924(c)(1)(A) (*ibid.*), it points to no case imposing such liability in a drugs-for-gun transaction. If aiding-and-abetting liability were truly the panacea respondent claims, one would expect to see some evidence of it, particularly in the four circuits that have squarely held that mere receipt of a gun in a drug transaction does not constitute "use." In fact, respondent's suggestion that it is "routine" to prosecute those who purchase drugs or firearms for "aiding and abetting" persons on the other side of the transaction (Opp. 10 (citing *United States* v. *Price*, 76 F.3d 526, 529 (3d Cir. 1996))), is demonstrably false. *Price* itself did not concern a drug transaction; it involved a defendant who robbed a bank while his accomplice held the teller at gunpoint. See 76 F.3d at 527. And of the twelve decisions *Price* cites as evidence that convictions for aiding and abetting § 924(c) offenses are common, *not one* involved a drug seller "aiding and abetting" the use of a firearm by a drug purchaser. See *id.* at 529.

Moreover, while respondent wisely restricts its claim regarding the "general[]" availability of aiding and abetting liability to circumstances "where the individual who supplies the drugs is not a government agent," Opp. 10, that qualification only underscores why charges for aiding and

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crime."); *Iiland*, 254 F.3d at 1274 ("The legislative history of the 1998 amendments directs that the 'in furtherance' requirement for possession is an even higher standard.").

abetting are inapposite to the exchange at issue here. Nearly all of the reported drugs-for-guns cases involved the use of undercover government agents or informants. See, *e.g.*, *Cotto*, 456 F.3d 25 (involving transaction in which a government agent provided the firearm); *Watson*, Pet. App. 1a (same); *Montano*, 398 F.3d 1276 (same); *Stewart*, 246 F.3d 728 (same); *Warwick*, 167 F.3d 965 (same); *United States* v. *Ramirez-Rangel*, 103 F.3d 1501 (9th Cir. 1997) (same); *Westmoreland*, 122 F.3d 431 (same); *United States* v. *Cannon*, 88 F.3d 1495 (8th Cir. 1996) (same); *United States* v. *Ulloa*, 94 F.3d 949 (5th Cir. 1996) (same); *United States* v. *Zuniga*, 18 F.3d 1254 (5th Cir. 1994) (same). In short, whatever role 18 U.S.C. § 2 may have in prosecuting § 924(c)(1)(A) offenses "generally," it has little (if anything) to do with the issue presented here.

III. Respondent's Attempt To Defend The Merits Of The Decision Below Is Unavailing And Only Underscores The Need For This Court's Review

Respondent's effort to defeat review by arguing that receipt of a firearm fits "squarely" within the definition of "use" articulated in *Smith* and *Bailey* (Opp. 5-7, 9 n.3) fares no better. Respondent first implies that *Smith* tacitly answered the question presented here when "[t]he Court observed that Section 924(d) included offenses in which the firearm was used 'as an item of barter or commerce,' such as, *inter alia*, the 'unlicensed receipt of a weapon from outside the State, in violation of § 922(a)(3).'" *Id.* at 4 (quoting *Smith*, 508 U.S. at 234 & n.*). Respondent fails to notice, however, that the relevant portion of § 924(d)(1) – which is a separate provision dealing with forfeiture of firearms and ammunition – refers not just to firearms that are *actually* "used" in a particular offense (as is required under the provision at issue here), but also to firearms that are merely "*intended* to be used" in the specified offenses. That distinction is highly significant: "Intended" use more naturally relates to offenses involving importation or receipt, whereas "actual" use is consistent only

with the "active employment" test established in *Bailey*. In any event, it is evident that *Smith* did not make the leap respondent suggests. In the sentence following the footnote upon which respondent relies, the Court stated that "it is clear from § 924(d)(3) that one who *transports, exports, sells, or trades* a firearm 'uses' it within the meaning of § 924(d)(1)." *Id.* at 234-235 (emphasis added). Notably, the Court did *not* include the words "imports," "buys," or "trades for" (or any of their synonyms) in that list.[5]

More fundamentally, respondent does not seriously attempt to reconcile its theory with the plain meaning of the word "use," nor does respondent confront the common-sense explanation that "[a] seller does not 'use' a buyer's consideration." *Westmoreland*, 122 F.3d at 436; see Pet. 10-11. Before accepting an invitation to ignore a 6-4 circuit split on the interpretation of an important federal criminal statute, this Court should require respondent to employ its construction in a grammatically intelligible manner. Defendants facing minimum consecutive sentencing enhancements deserve no less.

In any event, respondent's attempt to justify its reading under *Smith* and *Bailey* – a view that has been squarely rejected by four courts of appeals – only highlights the pressing need for this Court's intervention. Disputes over the meaning of a significant federal statute should be resolved on the merits, particularly when the controversy stems from conflicting interpretations of prior decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[5] Nor, contrary to respondent's suggestion (Opp. 6), did *Bailey* hold that consideration received in exchange for drugs is an "operative factor" that is therefore "actively employed" in the transaction. Respondent does not attempt to define what qualifies as an "operative factor," but, as previously explained (Pet. 11-16), it would be quite difficult to square the remainder of the Court's opinion in *Bailey* with the conclusion that "active employment" means simple receipt.

Respectfully submitted.

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MICHAEL A. WATSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

18 U.S.C. § 924(c)(1)(A) criminalizes the "use" of a firearm during and in relation to a drug trafficking offense and imposes a mandatory consecutive sentence of at least five years' imprisonment. In *Bailey* v. *United States*, 516 U.S. 137, 144 (1995), this Court unanimously held that "use" of a firearm under § 924(c)(1)(A) means "active employment." The question presented in this case is:

Whether mere receipt of an unloaded firearm as payment for drugs constitutes "use" of the firearm during and in relation to a drug trafficking offense within the meaning of 18 U.S.C. § 924(c)(1)(A) and this Court's decision in *Bailey*.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the Fifth Circuit (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted in 191 Fed. Appx. 326. The district court's decision (Pet. App. 3a–6a) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 25, 2006. The petition for a writ of certiorari was filed on October 23, 2006, and granted on February 26, 2007. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

In pertinent part, 18 U.S.C. § 924(c)(1) provides:

> (A) [A]ny person who, during and in relation to any crime of violence or drug trafficking crime * * * for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> > (i) be sentenced to a term of imprisonment of not less than 5 years;
> >
> > * * * *
>
> (D) Notwithstanding any other provision of law—
>
> > (i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

STATEMENT

This case concerns whether a person who receives an unloaded gun in exchange for drugs but does not actively employ it may be punished for "using" the gun during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A).

1. *Statutory Framework.* As currently in force, 18 U.S.C. § 924(c)(1)(A) authorizes prosecution for three types of conduct: (1) "us[e]" of a firearm "during and in relation to any crime of violence or drug trafficking crime," (2) "carr[ying]" a firearm during and in relation to such a crime, and (3) "possess[ing]" a firearm "in furtherance of any such crime." Convictions under § 924(c)(1)(A) carry severe consequences: for a first offense, a defendant convicted of "us[ing]" a firearm will receive a mandatory minimum sentence ranging from five to thirty years, depending on the type of weapon used.[1] *Id.* § 924(c)(1)(A). The mandatory minimum sentence increases to seven years if the firearm is "brandished" and to ten years if the firearm is "discharged." *Id.* § 924(c)(1)(A)(ii)-(iii). For a "second or subsequent conviction," the penalties increase substantially: Defendants receive a minimum term of twenty-five years of imprisonment, regardless of the type of firearm involved, or a

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[1] If the firearm is a short-barreled rifle or a short-barreled shotgun, the defendant will face a ten-year minimum sentence. If the firearm is "a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler," a thirty-year minimum sentence is mandated. 18 U.S.C. § 924(c)(1)(B).

life sentence "if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler." *Id.* § 924(c)(1)(C).

These mandatory sentences are distinct from and in addition to all other sentences, including those for the predicate crime of violence or drug trafficking offense. See 18 U.S.C. § 924(c)(1)(D). The statute expressly prohibits courts from either sentencing a defendant to probation in lieu of the prescribed term of imprisonment or suspending a § 924 sentence. It also directs that the sentence must be served consecutively, not "concurrently with any other term of imprisonment." 18 U.S.C. § 924(c)(1)(D).[2]

This Court has twice considered what constitutes "us[e]" under § 924(c)(1)(A). In *Smith* v. *United States*, 508 U.S. 223 (1993), a divided Court held that trading a gun to buy drugs constitutes such "use." Construing the word "use" first "in accord with its ordinary or natural meaning," *id.* at 228, and then against the background of related statutory provisions, *id.* at 233-237, this Court rejected the argument that § 924(c)(1)(A) criminalizes "use" of a gun only as a weapon. The Court emphasized that a defendant who trades a gun for

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[2] Defendants convicted of § 924(c)(1) offenses who also qualify as "career offenders" under section 4B1.1 of the United States Sentencing Guidelines face sentences well exceeding the statutory mandatory minimum terms of imprisonment. If a defendant is convicted of a felony classified as either a crime of violence or a controlled substance offense and has at least two prior felony convictions for such offenses, he qualifies as a career offender. See U.S.S.G. § 4B1.1(a). If such a defendant is convicted of a count under 18 U.S.C. § 924(c), the Guidelines prescribe a sentencing term that, at minimum, ranges from 262 to 327 months. See U.S.S.G. § 4B1.1(c)(3). Only those defendants who accept responsibility for the offense and timely notify government officials of their intent to enter a guilty plea are entitled to that minimum sentencing range, however. *Ibid.*; *id.* § 3E1.1. When the defendant elects to plead not guilty but is convicted at trial, the court must impose a minimum sentence of 360 months to life imprisonment. *Id.* § 4B1.1(c).

drugs has "used" the weapon within the "everyday meaning of that term," and noted the danger that the individual who brought the weapon with him, for use as "currency" might instead "convert[it] * * * to cannon." 508 U.S. at 228.

In *Bailey* v. *United States*, 516 U.S. 137 (1995), this Court, in a unanimous opinion written by the author of the majority opinion in *Smith*, firmly rejected a broad reading of "use" and of the Court's earlier decision. Starting again with the word's "ordinary or natural meaning," *id.* at 145, and then considering "its placement and purpose in the statutory scheme," *ibid.*, this Court held that "use" under § 924(c)(1)(A) "requires evidence sufficient to show an *active employment* of the firearm by the defendant." 516 U.S. at 143 In particular, it held, a defendant's possession of a gun to facilitate or embolden illegal drug-dealing could not support a conviction under the "use" prong of § 924(c)(1). 516 U.S. at 149. Although it might not be linguistically impossible under such circumstances to describe the defendant as "using" the gun for protection, *Bailey* explained, the text and structure of the statute made clear that § 924(c)(1) did not reach such "nonactive" "uses." 516 U.S. at 149. "[W]ithout [a gun's] more active employment, ["use"] is not reasonably distinguishable from possession," which, the Court emphasized, the statute clearly did not criminalize. *Ibid.*

2. *Proceedings Below.* Petitioner Michael Watson, a legally blind fifty-five-year-old man (PSR ¶ 66), sought to purchase a firearm in order to protect himself and his property against robbery and theft. Pet. App. 9a. In November 2004, Watson discussed with a government informant his interest in buying a gun. *Ibid.* When Watson asked about the cost, the informant replied that he did not know a cash price, but that he would instead introduce Watson to an individual who would provide him with a firearm in exchange for drugs. *Ibid.*

On November 12, 2004, the informant brought that individual—an undercover government agent—to Watson's home in Ascension Parish, Louisiana. Gov't C.A. Br. 5. Watson provided the undercover agent with twenty-four dosage units of oxycodone hydrochloride, also known as OxyContin. Pet. App. 9a. Although he held prescriptions for this medication, Watson later explained to the agents that his financial circumstances were so precarious that he sometimes had to sell his medication. *Id.* at 10a. In exchange for the pills, the government agent provided Watson with an unloaded pistol. *Ibid.* Immediately upon conclusion of the transaction, the agent arrested Watson. *Id.* at 9a.

Federal prosecutors brought a three-count indictment against Watson in the United States District Court for the Middle District of Louisiana. In addition to charging him with distributing a Schedule II controlled substance, see 21 U.S.C. § 841, and possessing a firearm as a convicted felon, see 18 U.S.C. § 922(g), the indictment accused him of violating § 924(c) by "using" the gun during and in relation to a drug trafficking offense—*i.e.*, the November 12 barter. J.A. 7-9. The parties ultimately entered into a plea agreement upon stipulated facts. Pet. App. 7a-11a. Under the terms of the agreement, Watson pleaded guilty to all counts, but reserved the right to appeal whether, as a matter of law, the stipulated facts could support a conviction for firearm "use." Pet. App. 7a-8a; J.A. 11-20. Specifically, Watson maintained the right to challenge whether passive receipt of a firearm in exchange for drugs constitutes "use" of the firearm within the meaning of § 924(c)(1)(A). Pet. App. 7a.

The district court accepted the plea agreement, concluding that under Fifth Circuit precedent the stipulated facts sufficed to support Watson's conviction. J.A. 19-20. Accordingly, the district court, while treating the guilty plea to the § 924(c)(1)(A) charge as a conditional plea under Federal Rule of Criminal Procedure 11(a)(2), entered a judgment of conviction on all counts.

At sentencing, the district court, citing Watson's two prior convictions (both more than 15 years old), PSR ¶¶ 50-51; 11/17/05 Tr. 14, pronounced him a "career offender" for Sentencing Guidelines purposes. See U.S.S.G. § 4B1.1(a); note 2, *supra*. Under the applicable Guidelines, the § 924(c)(1) conviction required an overall sentence between 262 and 327 months, PSR ¶ 85; see U.S.S.G. § 4B1.1(c)(3), significantly more than the 151-188 months required had he been convicted only on the drug and firearm possession counts. The court imposed a sentence at the low end of that range—262 months (nearly 22 years)—reflecting concurrent sentences of 202 months and 120 months, respectively, on the drug and gun-possession offenses, plus the statutory minimum, consecutive sentence of 60 months for the § 924(c)(1)(A) conviction. Pet. App. 6a.

Watson timely appealed his conviction for the § 924(c)(1)(A) violation. As contemplated by the plea agreement, the appeal raised only whether mere receipt of a gun was insufficient as a matter of law to support his conviction for "use" of a firearm during and in relation to a drug trafficking offense. Pet. C.A. Br. 2.

In an unpublished opinion, the Fifth Circuit held that it was bound to follow circuit precedent established in *United States* v. *Ulloa*, 94 F.3d 949 (5th Cir. 1996), and *United States* v. *Zuniga*, 18 F.3d 1254 (5th Cir. 1994), both of which had upheld convictions under § 924(c)'s "use" prong for receiving guns in exchange for drugs.[3] Pet. App. 2a.

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[3] In *Zuniga*, the Fifth Circuit rejected as foreclosed by *Smith* the defendants' argument that their receipt of firearms in exchange for drugs could not be punished as "use" within the meaning of § 924(c)(1). See 18 F.3d at 1258. In *Ulloa*, 94 F.3d at 956, the court adhered to that conclusion after rejecting the argument that passive receipt did not constitute the requisite "active employment" under this Court's intervening decision in *Bailey*. But see *Ulloa*, 94 F.3d at 958 (Politz, C.J., dissenting).

SUMMARY OF ARGUMENT

Section 924(c)(1) imposes mandatory, consecutive sentences of at least five years' (and up to life) imprisonment on any person who "uses" a firearm "during and in relation to" a drug-trafficking offense. In *Smith* v. *United States*, 508 U.S. 223 (1993), and *Bailey* v. *United States*, 516 U.S. 137 (1995), this Court held that the statutory term "use" should be given its ordinary and natural meaning. In *Bailey*, the Court further explained that a defendant "use[s]" a firearm only if he "active[ly] employ[s]" it. *Id.* at 143. Because Watson did not "use" the firearm in any ordinarily recognizable sense of that word—let alone "actively employ" it—his conviction must be reversed.

I. Statutory interpretation begins with the language of the statute Congress enacted, and the plain meaning of "use" in § 924(c)(1) is dispositive here. It is wholly unnatural to say that a person "uses" an object simply by receiving it, and it is impossible to describe receipt as "active employment," as *Bailey* held § 924(c)(1) requires. A person in Watson's position, who does nothing more than receive a gun as payment, has neither "employed" the firearm nor engaged in "active" conduct. The text and structure of the surrounding and related statutory provisions—and the structure, history, and purposes of the overall statutory scheme—abundantly confirm the plain meaning of § 924(c)(1). All make clear that, in enacting § 924(c)(1)'s "use" prong, Congress provided for punishment only of those who actively employ firearms in drug transactions (as this Court held in *Bailey*), not those who merely receive (or attempt to receive) firearms by trading drugs.

II. Although a number of lower courts have, like the Fifth Circuit below, held that individuals who trade drugs *for* guns may be convicted of firearm "use" in violation of § 924(c)(1), none has suggested that such a result is actually consistent with, much less compelled by, the text of the statute. To the

contrary, several of these decisions have forthrightly acknowledged the incompatibility of their rule with § 924(c)(1)'s plain meaning. Those courts nonetheless have concluded that mere receipt may be punished as "use," relying on perceived policy concerns as well as on certain snippets of language in this Court's *Bailey* opinion.

Neither rationale is valid. Even if it were ever permissible (despite the rule of lenity) to enlarge a criminal statute for policy reasons, there is no reason to do so here. Construing the statute as written makes complete sense, particularly in light of the consistent legislative judgments the statute reflects. Equally troubling is the lower courts' misplaced reliance on certain language in *Bailey* torn from its proper context—specifically, this Court's reference to the requirement that a defendant's active employment (*i.e.*, "use") of a firearm *also* be an "operative factor" in the underlying offense and its recognition that, under *Smith*, "bartering * * * a firearm" qualifies as a "use." Properly interpreted and understood in their context, these aspects of the *Bailey* opinion provide no support whatsoever for the Fifth Circuit's holding. Beyond that, reliance on these snippets of language simply misses the forest for (a couple of) the trees. In *Bailey*, after all, this Court *rejected* a construction of "use" that was *narrower* and *more plausible* than the one accepted by the Fifth Circuit below. The lower courts that have equated *Bailey*'s definition of "use" with participation in any transaction in which the gun is an "operative factor" overlook the central thrust of this Court's unanimous opinion. Thus, *Bailey* cannot reasonably be read as in any way intimating that obtaining or seeking to obtain a gun through barter is "use" of the firearm.

III. Even if the ordinary meaning of § 924(c)(1) did not foreclose the Fifth Circuit's interpretation, at the very least petitioner's interpretation is a reasonable one triggering the rule of lenity. That rule serves important constitutional values. It ensures that legislatures define substantive crimes,

and that individuals are provided with fair warning concerning the scope of penal statutes. Congress easily could have made receipt of a firearm as consideration in a drug transaction punishable as "use" under § 924(c)(1), but it did not do so, and—far from giving "fair notice"—the statutory language Congress actually enacted sends a clear signal that such activity does *not* fall within the provision's sweep.

ARGUMENT

I. MERE RECEIPT OF A FIREARM IN EXCHANGE FOR DRUGS IS NOT "USE" UNDER 18 U.S.C. § 924(C)(1)

By receiving a gun as payment for drugs, Watson did not "use" that firearm within the meaning of 18 U.S.C. § 924(c)(1). In *Smith*, this Court made clear that the term must be given its ordinary and natural meaning, and, under any reasonable or linguistically coherent reading of the term, a seller does not *use* a buyer's consideration simply by *receiving* it. In *Bailey*, this Court further explicated Congress's intent in § 924(c)(1), unanimously holding that even certain activities that might ostensibly be cast as "uses"—*e.g.*, a defendant's keeping a gun present to facilitate drug selling—are beyond the reach of the statute. The Court held that the Government may not rely on proof that the defendant brought a gun with him and that the gun's accessibility facilitated drug trafficking; rather, it must "show an *active employment* of the firearm by the defendant." *Bailey*, 516 U.S. at 143. "Use," according to *Bailey*, implies "action and implementation," *id.* at 145, and the "inert presence of [a defendant's] firearm," *id.* at 149, during the drug transaction is not enough. Simple receipt of a gun in exchange for drugs—a quintessentially passive event in which the recipient does nothing more than take possession of an object—falls far short of the "active employment" demanded by *Bailey*.

In addition to betraying the plain language of § 924(c)(1), equating "receipt" with "use" is utterly inconsistent with the structure, purposes, and history of § 924(c)(1), and with the larger statutory scheme in which § 924(c)(1) operates. Congress has carefully and consistently distinguished between "use" and "receipt" in myriad other criminal statutes governing weapons transactions, and, consistent with those guideposts, *Bailey* explicitly and decisively rejected the contention that § 924(c)(1)'s "use" prong criminalizes every combination of drugs and guns. *Bailey*, 516 U.S. at 149-150. Particularly in a statute aimed at discouraging individuals' active employment of guns during drug crimes—typically, the inherently dangerous "use" of a gun as a means to an often violent end—the statute's plain meaning cannot and may not be stretched to cover receipt.

A. As A Matter Of Ordinary Meaning, "Use" Does Not Encompass The Mere Receipt Of A Firearm

In this case, not only "must [the analysis] begin * * * with the language of the statute itself," but it is "also where the inquiry should end." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); see *ibid.* ("[W]here * * * the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'") (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)). In each of three recent decisions interpreting 18 U.S.C. § 924(c)(1), this Court has emphasized that the language Congress enacted in that provision should be given its ordinary and natural meaning. See *Smith*, 508 U.S. at 228 ("[W]e normally construe [a statutory word] in accord with its ordinary or natural meaning."); *Bailey*, 516 U.S. at 145 ("[t]he word 'use' in the statute must be given its 'ordinary or natural' meaning") (quoting *Smith*); *Muscarello* v. *United States*, 524 U.S. 125, 128 (1998) (same with regard to "carry" prong of § 924(c)(1)); see generally *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the

assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). That principle is dispositive here.

It is neither "reasonable" nor "normal," *Smith*, 508 U.S. at 230, to say that a person has "used" an object merely by receiving it. Indeed, the government's theory of criminal liability in this case fails what all Justices in *Smith* agreed was the threshold inquiry: whether the particular conduct could "be described as 'use' within the everyday meaning of that term." See *id.* at 228.[4]

As several courts of appeals have vividly illustrated, a buyer perhaps "uses" his own payment as a medium of exchange, see *Smith*, 508 U.S. at 229, but the seller's receipt of that payment does not constitute the seller's "use" of the payment. Thus, the Seventh Circuit has explained that "passively receiving a gun from an undercover agent in payment for drugs cannot constitute a use under section 924(c)(1)":

> When we consider, as did the Supreme Court in both *Bailey* and *Smith*, the ordinary or natural meaning of the word "use," we note that there is no grammatically correct way to express that a person receiving a payment is thereby "using" the payment. * * * If [the agent] had paid for the gun with a $100 bill, we would not say that [the defendant] "used" $100 in selling his gun[.] * * * *A seller does not "use" a buyer's consideration.* The only person actively employing the gun in this transaction is the government agent.

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[4] Although the dissenting Justices in *Smith* argued that this test was *insufficient* in itself to delimit the class of activity Congress intended § 924(c)(1) to proscribe, 508 U.S. at 242-43 (Scalia, J., dissenting), they did not suggest that the inquiry was *unnecessary*, *i.e.*, that conduct that could not be described even as ordinary "use" might still be subject to punishment.

United States v. *Westmoreland*, 122 F.3d 431, 435-436 (1997) (Rovner, J., joined by Posner, C.J., & Evans, J.) (emphasis added).

Similarly, the D.C. Circuit in *United States* v. *Stewart*, 246 F.3d 728, 731 (2001) (Sentelle, J., joined by Williams & Rogers, JJ.), explained that, as a matter of ordinary English usage, the word "use" does not describe receipt of an item in a barter exchange. Judge Sentelle there observed that, "when a person pays a cashier a dollar for a cup of coffee in the courthouse cafeteria, the customer has not used the coffee. He has only used the dollar bill." *Ibid.* Thus, "[c]onsistent with the 'ordinary meaning' approach employed by the Supreme Court in *Smith* and *Bailey*, we cannot see how a defendant 'uses' a gun when he receives it during a drug transaction." *Ibid.*

Even courts that ultimately have held that receipt of a firearm *can* support liability under § 924(c)(1) have acknowledged that the grammatically sensible reading of the statute supports the opposite result. For example, the First Circuit recently confessed that,

> while it is easy to see how [the defendant] "used" the heroin to get the guns, it is somewhat less natural to say that he "used" the guns as well. Were we writing on a blank slate, we might well be inclined to say, based on the most natural reading of the statute, that [the defendant] did not "use" the guns by bartering for them.

United States v. *Cotto*, 456 F.3d 25, 28 (1st Cir. 2006) (citations omitted), petition for certiorari pending (U.S. S. Ct. No. 06-8168). Likewise, the Third Circuit readily acknowledged the "forceful argument * * * [that] 'there is no grammatically correct way to express that a person receiving a payment is thereby "using" the payment.'" *United States* v. *Sumler*, 294 F.3d 579, 583 (3d Cir. 2002) (quoting

Westmoreland, 122 F.3d at 435). Although both of those decisions upheld § 924(c)(1) liability for other (erroneous) reasons (see pp. 27-39, *infra*), both candidly admitted what should be dispositive of the question presented here: The ordinary and natural reading of "use" does not bring receipt of a firearm in a drug transaction within the ambit of § 924(c)(1).

Moreover, the very same sources the *Smith* majority pointed to in upholding the defendant's conviction in that case—standard dictionary definitions—compel reversal here. To determine whether the defendant had "used" a firearm, the *Smith* Court asked whether "he 'employed' it" or "'derived service' from it." 508 U.S. at 229 (citing *Webster's New International Dictionary* 2806 (2d ed. 1950); *Black's Law Dictionary* 1541 (6th ed. 1990)); see also *Bailey*, 516 U.S. at 145 (describing *Smith*'s understanding of "use" as the word's "ordinary or natural" meaning) (citing same). Other dictionary definitions of "use" agree, emphasizing that a person "uses" an item by applying it instrumentally. See, *e.g.*, 19 *The Oxford English Dictionary* 353 (2d ed. 1991) ("To employ or make use of (an article, etc.), esp. for a profitable end or purpose; to utilize, turn to account."); *Random House Dictionary of the English Language* 2097 (2d unabridged ed. 1987) ("to employ for some purpose; to put into service; make use of"). The common thread running through these definitions is that a person who "uses" something personally applies it toward the achievement of a goal. See generally Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretation of "Use a Firearm,"* 73 Wash. U.L.Q. 1159, 1176 (1995) ("Expressions of the form 'W used X' express an idea more fully stated in the form 'W used X as Y to do Z.' X served an instrumental function, Y, in some purposeful activity, Z, in which W was engaged.").

The holding of *Smith* is consistent with those principles. In an ordinary conversation, one would not find it a

particularly surprising use of language to say, "My buddy used his gun to buy some drugs." Yet it would be linguistically startling to hear someone say, "My buddy used a gun by receiving it for drugs." In ordinary usage, the "use" is what may happen *after* the receipt, not the receipt itself.

Here, Watson cannot be said to have "us[ed]" the firearm provided by the undercover government agent merely because Watson received it in exchange for drugs. His receipt of the firearm did not entail applying it as an instrument toward the accomplishment of some *other* aim. Cf *Smith*, 508 U.S. at 229 (The defendant "'used' or 'employed' it as an item of barter to obtain cocaine; he 'derived service' from it because it was going to bring him the very drugs he sought."). Nor, of course, does the possibility that Watson may have *intended* to use the gun *after* he received it (that is, to utilize it in the future) affect the analysis—he did not employ it or derive service from it "during and in relation to" the drug transaction itself, as § 924(c)(1) expressly requires. See also pp. 23-24, *infra* (discussing § 924(d)(1), which authorizes seizure of firearms "intended to be used" for certain crimes).

B. Mere Receipt Involves No "Active Employment," As *Bailey* Requires

Construing simple receipt in a barter transaction as "use" fails to satisfy the requirements this Court unanimously announced in *Bailey*. *Bailey* rejected the claim, advanced by the government and adopted by several lower courts, that every combination of firearms and drug trafficking was punishable under § 924(c)(1) and that any conduct that might possibly be described as "use"—including possession of a gun, the presence of which "emboldens" a defendant's drug trafficking activities, 516 U.S. at 149—would support conviction. The problem with convicting a defendant who "uses" a gun for protection (*e.g.*, one who brings a gun with him for self-defense), the Court explained, is that it would obscure distinctions that Congress intended to maintain

between "use" and "possession"; between actual and "intended use"; and between "carrying" a gun and "using" it. *Id.* at 149-150. The way to respect those legislative judgments, the Court held, was to construe "use" as restricted to conduct entailing "active employment of the firearm." *Id.* at 143.

Reversal here follows *a fortiori* from *Bailey*. First, as explained above, it is even less natural than in *Bailey* to describe Watson's conduct as "use" of the gun. Moreover, if, as *Bailey* unanimously held, defendants who bring loaded guns to drug transactions and whose possession facilitates their criminal acts cannot be punished under § 924(c) for "use," then defendants in Watson's position, who either are arrested before ever obtaining a gun or who momentarily hold government-provided, unloaded guns under carefully controlled circumstances, may certainly not be punished as firearms "users." The concerns that had led lower courts to balk at the "active employment" limitation the *Bailey* Court emphatically embraced—*e.g.*, the ever-present danger that the defendant who brings a gun to a drug deal will put it to destructive use—are almost entirely absent when individuals like Watson come to the transaction unarmed, carrying only drugs they hope to use to obtain a gun. When a person does nothing more than receive a gun as payment for drugs in a bartering exchange, that person has neither employed the gun nor engaged in active conduct.

To punish mere receipt as "use" is to ignore a central teaching of *Bailey*: Congress did not mean for "use" to reach mere *possession*, even when such possession was highly dangerous and directly related to the defendant's drug offenses. The D.C. Circuit decision reversed in *Bailey* had acknowledged that "mere possession" could not be prohibited "use," *United States* v. *Bailey*, 36 F.3d 106, 110 (1994) (en banc), but had then held, as had many other appellate courts, that it was permissible to punish defendants whose possession involved something more. See *id.* at 118 ("When there is

evidence of proximity and accessibility, we will affirm a conviction under § 924(c)(1)"); *United States* v. *Long*, 905 F.2d 1572, 1576 (D.C. Cir. 1990) (Thomas, J.) (documenting that "[t]he word ['use'] has been losing its conventional, active connotation for some time," noting decisions holding that "defendant can 'use' a firearm without actively employing it," – *e.g.*, "simply by possessing [guns] in the vicinity of drugs"). This Court concluded that such limitations did not adequately respect Congress's decision not to bring "possession" within the "use" prohibition, citing both the difficulty of drawing lines in cases where "facilitative" or "emboldening" possession was alleged and the likelihood that, as a practical matter, any line between "mere possession" and "possession plus" would be breached. As the Court explained:

> Where the Court of Appeals erred was not in its conclusion that "use" means more than mere possession, but in its standard for evaluating whether the involvement of a firearm amounted to something more than mere possession. Its proximity and accessibility standard provides almost no limitation on the kind of possession that would be criminalized; in practice, nearly every possession of a firearm by a person engaged in drug trafficking would satisfy the standard, "thereby eras[ing] the line that the statutes, and the courts, have tried to draw"

516 U.S. at 143-144 (quoting *United States* v. *McFadden*, 13 F.3d 463, 469 (1st Cir. 1994) (Breyer, C.J., dissenting)); 516 U.S. at 144 ("An evidentiary standard for finding 'use' that is satisfied in almost every case by evidence of mere possession does not adhere to the obvious congressional intent to require more than possession to trigger the statute's application."). Indeed, receipt of a firearm is, by definition, *preliminary to* possession of a firearm, making receipt even more attenuated and removed from the conduct *Bailey* held did not support § 924(c)(1) liability.

Bailey established a firm boundary to give effect to Congress's distinction between "possession" and "use," limiting the latter to cases where the government could show "active employment" of the firearm. The conduct at issue here—receipt of a gun in a barter exchange—does not constitute "employment," much less "active" employment. Employment of a gun requires that one apply it toward some end. See 5 *The Oxford English Dictionary* 191 (2d ed. 1991) (defining "employment" as "[t]he action or process of employing; the state of being employed"). When a person receives a gun as payment for drugs, he has not personally "appl[ied the gun] to some definite purpose" or "use[d it] as a means or instrument"—in fact, he has not applied it at all. See *Westmoreland*, 122 F.3d at 436 ("Without * * * employment, and with a showing that [defendant] merely held the gun for a moment after a government agent handed it to him and before he was arrested, we cannot sustain the conviction."). Because petitioner's conduct in this case does not square with the meaning of "employment," petitioner has not "used" the gun.

Bailey further held that § 924(c)(1)'s prohibition of gun "use" requires "*active* employment" by the defendant; inherently *passive* activity does not suffice. Even if Watson somehow could be said to have "employed" the gun handed him by law enforcement, his conduct was quintessentially passive—more so than the facilitating and emboldening possession held insufficient as a matter of law in *Bailey*. As the Seventh Circuit explained in *Westmoreland*, "[n]o matter how we phrase the events in this transaction, the defendant is on the passive side of the bargain. He received the gun. He was paid with the gun. He accepted the gun. But in no sense did he *actively* 'use' the gun." 122 F.3d at 435 (emphasis added); see also *id.* at 436 ("The evidence presented at trial demonstrated, at best, that [the defendant] *passively* accepted the gun from a government agent in payment for drugs, and then was immediately arrested.") (emphasis added).

Similarly, the Seventh Circuit rejected the government's suggestion that the defendant's brief "display" of the gun he received from government agents during the time "it took for backup agents to be alerted to approach and make the arrest" constituted active employment of the firearm." *Ibid.* "[A]t that point in the transaction," the court explained, "the gun was nothing more than the 'inert presence' described in *Bailey*. A government agent had supplied an inoperable, unloaded gun to the defendant in place of currency." *Ibid.* The same is true here: the government agent supplied an unloaded firearm to Watson, who was promptly arrested.

This Court has relied on the distinction between active and passive conduct in other cases interpreting the word "use." In *Jones* v. *United States*, 529 U.S. 848 (2000), for example, the Court was asked to decide whether arson of a private residence constitutes destruction of property "*used* in interstate or foreign commerce." *Id.* at 850 (quoting 18 U.S.C. § 844(i) (emphasis added). The Court held that the "use" qualification in § 844(i) "is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Id.* at 855 (citing *Bailey*, 516 U.S. at 143, 145). Based on that understanding of "use" in § 844(i), the Court noted that "[i]t is surely not the common perception that a private, owner-occupied residence is 'used' in the 'activity' of receiving natural gas, a mortgage, or an insurance policy." *Id.* at 856. To qualify as property "used" in interstate commerce, the home itself had to be actively employed in interstate commerce, *e.g.*, by being used as a home office for an interstate commercial enterprise. See *ibid.* Likewise here, because the receipt of a gun as payment for drugs bears only a passive connection to the gun itself, the recipient's conduct cannot be characterized as active, and therefore cannot be "use" under *Bailey*.

C. Congress's Omission Of The Terms "Possession" And "Receipt" From § 924(c)(1)'s "Use" Prong Further Demonstrates The Lower Court's Error

In *Bailey*, this Court rejected the proposition that possession of a firearm constitutes "use" of that firearm under § 924(c)(1), in part because, "[h]ad Congress intended possession alone to trigger liability under § 924(c)(1), it easily could have so provided." 516 U.S. at 143. *Bailey* emphasized that Congress frequently employed the term "possess" in other statutes to describe prohibited gun-related conduct, *ibid.* (citing, *inter alia*, 18 U.S.C. § 922(g), (j), & (k)), and recognized that its failure to do so in § 924(c)(1) carried significance. Had Congress wanted to criminalize the expansive range of conduct the government argued for, the Court explained, "it could have simply substituted a more appropriate term—'possession'—to cover the conduct it wished to reach." 516 U.S. at 148.[5]

Like the term "possess," the term "receive" is used to describe prohibited gun-related conduct in numerous other federal statutes, including many of the same ones this Court cited in *Bailey*. For example, 18 U.S.C. § 922(g) prohibits certain persons from "*receiv[ing]* any firearm or ammunition which has been shipped or transported in interstate * * * commerce" and from "*possess[ing]* [a firearm] in or affecting commerce." 18 U.S.C. § 922(g) (emphasis added). Similarly, § 922(k) makes it unlawful for "any person * * * to *possess* or *receive* any firearm" that has had the serial number removed. 18 U.S.C. § 922(k) (emphasis added). Many other statutory provisions include language explicitly prohibiting

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[5] Notably, after this Court's decision in *Bailey* stating that mere possession of a firearm during and in relation to a drug trafficking crime does not constitute "use" of that firearm, Congress amended § 924(c)(1)(A) to prohibit "possess[ion of] a firearm * * * in furtherance of any such crime." Congress did not, however, disturb the meaning of "use" or add any prohibition against receipt of a firearm. See 18 U.S.C. § 924(c)(1)(A) (2000). See pp. 22-23, *infra*.

receipt of a firearm. See, *e.g.*, 18 U.S.C. §§ 922(a)(1) (barring certain persons from "receiv[ing] any firearm in interstate or foreign commerce"), 922(a)(3) (barring certain persons from "receiv[ing] in the State where [they] resid[e] * * * any firearm * * * obtained by such person[s] outside that State" subject to specified exceptions), 922(a)(9) (barring certain persons from "receiv[ing] any firearms unless such receipt is for lawful sporting purposes"), 922(l) (barring certain persons from "knowingly * * * receiv[ing] any firearm" that has been illegally imported), 922(n) (barring indicted felons from "receiv[ing] any firearm * * * which has been shipped * * * in interstate or foreign commerce"), 922(p)(1) (barring persons from "receiv[ing] any firearm" that makes security detection sufficiently difficult). Indeed, Congress criminalized receipt of a firearm in § 924(b)—the subsection immediately preceding the provision at issue here—by prohibiting the receipt of a firearm with intent to commit an offense punishable by more than one year in prison. To paraphrase this Court's conclusion in *Bailey*, had Congress intended to criminalize receipt of a gun under the statute, it could have simply used a more appropriate term—"receive"—to cover the conduct it wished to reach.

D. Congress's Frequent Proscription of Both "Use" And "Receipt" In Other Criminal Statutes Confirms That "Use" Does Not Cover Mere "Receipt"

That Congress did not intend § 924(c)(1) to reach simple receipt is confirmed by Congress's explicit proscription of both "use" and "receipt" in other criminal statutes. For example, 15 U.S.C. § 1644(d) imposes a prison sentence of up to ten years upon anyone who "knowingly *receives*, conceals, *uses*, or transports" anything of value that has been obtained through credit card fraud. 15 U.S.C. § 1644(d) (emphasis added). Presumably, that statute would cover both those who *used* such items by bartering for something else, cf. *Smith*, 508 U.S. at 241, and those who *received* them through

barter transactions (or any other type of transaction) knowing they had been obtained through credit card fraud. In particular, Congress has separately criminalized both "use" and "receipt" of items and substances that pose exceptional danger. See, *e.g.*, 18 U.S.C. §§ 175c(a)(1) (criminalizing the "recei[pt]" or "use" of variola, the virus that causes smallpox), 229(a)(1) (criminalizing the "recei[pt]" or "use" of chemical weapons), 831(a)(1) (criminalizing the "recei[pt]" or "use" of nuclear materials), 2332g(a) (criminalizing the "recei[pt]" or "use" of heat-seeking missiles used to destroy aircraft), 2332h(a)(1) (criminalizing the "recei[pt]" or "use" of radiological dispersal devices). Thus, Congress is well aware of the distinction between "use" and "receipt."

Likewise, Congress has consistently recognized the difference between "acquisition" of an item and its "use." See, *e.g.*, Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1213-14 (declaring its purpose to be the protection of "law abiding citizens with respect to the *acquisition, possession, or use* of [certain] firearms") (emphasis added); see also 22 U.S.C. § 2573(c) (same). And 42 U.S.C. § 5651(a)(19) authorizes grants to States "to reduce the unlawful acquisition and illegal use of guns by juveniles." That distinction runs throughout the United States Code. See, *e.g.*, 7 U.S.C. § 2024(b)(1) ("[W]hoever knowingly *uses*, transfers, *acquires*, alters, or *possesses* [food stamp program] coupons, authorizations cards, or access devices shall * * * be guilty of a felony.") (emphasis added); 16 U.S.C. § 1853a(c)(5)(D)(i) (requiring regulatory consideration of a maximum share that "a limited access privilege holder [for a managed fishery] is permitted to *hold, acquire, or use*") (emphasis added).[6]

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[6] Similarly, myriad statutes emphasize that real or other property is acquired for later use, not used by being acquired. See, *e.g.*, 2 U.S.C. § 2002(a) ("Chief Administrative Officer of the House of Representatives may acquire buildings and facilities * * * for the use of the House of Representatives."); 25 U.S.C. § 488 (authorizing loans "to any Indian tribe

By contrast, the plain language of § 924(c)(1) makes clear that its stiff, additional sentences should apply only to defendants who actually "used" (as opposed to merely "received" or "acquired") a firearm during a drug trafficking offense.

E. Statutory Provisions Adjacent To The "Use" Prong Of § 924(c)(1)—The 1998 Amendment To § 924(c)(1) And The Forfeiture Provisions In § 924(d)—Further Show That "Use" Does Not Reach Mere Receipt

An expansive view of § 924(c)(1)'s "use" prong is also at odds with neighboring provisions within § 924. First, enlarging the term "use" to accommodate mere receipt would contravene the import of Congress's 1998 amendment to § 924(c)(1) in response to this Court's decision in *Bailey*. Although Congress extended § 924(c)(1)'s reach, it carefully left the statute's "use" provision untouched, ratifying this Court's limitation of that term's reach in *Bailey*. Rather, Congress added language criminalizing "possession" of a gun "in furtherance of" a drug trafficking crime. Indeed, Congress rejected a proposal by the Department of Justice that would have repealed the "uses or carries" language and substituted a simple "possession" standard. H.R. Rep. No. 105-344, at 14 (1997). Congress instead added the modifier "in furtherance of" to impose "a slightly higher standard" than the "during and in relation to" standard set out in the "use" and "carry" prongs. *Id.* at 11; see also *ibid.* (defining "furtherance" as "the 'act of furthering, helping forward, promotion, advancement, or progress.'") (citing *Webster's*

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* * * to acquire lands * * * for use of the tribe"). Other statutes authorize acquisition of land or objects in circumstances where it would be absurd to say that one "used" the land or object simply by acquiring it. For example, 10 U.S.C. § 9773(e) authorizes the Secretary of the Air Force to "acquire at desired locations bombing and machine gun ranges necessary for practice by, and the training of, tactical units." It would be bizarre, however, to say the Secretary "uses" a bombing range by acquiring it.

New International Unabridged Dictionary 1022 (2d ed. 1950) and *Black's Law Dictionary* 675 (6th ed. 1990)). The view of "use" adopted by the court of appeals below, then, reaches conduct that congressional committees specifically considered and Congress declined to criminalize when amending § 924(c)(1) in response to *Bailey*.

Second, § 924(d) supports a narrow definition of "use" of a firearm under § 924(c)(1). Section 924(d) authorizes the seizure and forfeiture of firearms that are "involved in or used in" violations of certain federal laws, as well as firearms that are "intended to be used" in a separate, but partially overlapping, range of offenses. See 18 U.S.C. §§ 924(d)(1), 924(d)(3). As both *Smith*, 508 U.S. at 233-234, and *Bailey*, 516 U.S. at 146, recognized, § 924(d) may shed some light on the meaning and scope of "use" under § 924(c)(1). Congress's carefully crafted language in § 924(d) demonstrates that Congress attached significance to the distinctions between the relatively broad "involved in or used in" language in § 924(d) and the precise, narrower term "use" in § 924(c)(1).

The statutory language employed by Congress in the first portion of § 924(d), providing for the seizure and forfeiture of a gun "involved in or used in" certain crimes, reflects Congress's understanding that "use" of a gun is meant narrowly. The specific crimes listed in this portion of the statute include § 922(g) (criminalizing, among other things, the receipt and transportation of a firearm by certain persons), § 922(h) (prohibiting employees of certain persons from receiving, possessing, or transporting a firearm), and § 922(j) (proscribing, among other things, the receipt, possession, storage, or sale of a stolen firearm). By authorizing the seizure of a firearm that is either used in or *involved in* the underlying offenses, Congress recognized that many of the offenses covered by the statute would not rise to the level of actual "use" of a firearm. That is, if Congress believed that the underlying offenses, such as receipt, storage, and transpor-

tation of a firearm, constituted "use" of such weapons, it would not have needed to add the "involved in" language.

Another clause in § 924(d)(1) allows the seizure and forfeiture of a firearm "intended to be used" in a range of offenses listed in subsection (d)(3) of the statute. As this Court noted in *Bailey*, Congress's precise choice of words here reflects its recognition of the difference between firearms "used" in commission of an offense and those "intended to be used" in such a crime. *Bailey*, 516 U.S. at 146. When Congress apparently determined that "use" alone does not cover all the activities it wished to encompass, it carefully expanded the statutory language to include activities like "intent to use" a firearm or "involv[ing a firearm] in" a crime. In § 924(c)(1), by contrast, Congress's decision to include only the word "use"—without any of this expanding language—demonstrates its intent to define narrowly the conduct subject to the heavy mandatory prison terms required by that provision.

F. Giving "Use" Its Ordinary Meaning Accords With What This Court And The Government Have Long Recognized To Be The Core Purpose Of § 924(c)(1)

According to § 924(c)(1)'s original sponsor, Representative Poff, the statute's purpose was to "persuade the man who is tempted to commit a Federal felony to *leave his gun at home*." 114 Cong. Rec. 22,231 (1968) (emphasis added). The Court has repeatedly recognized the importance of Representative Poff's statement and has given it substantial weight when interpreting the meaning of § 924(c)(1). See *Muscarello*, 524 U.S. at 132; *Busic* v. *United States*, 446 U.S. 398, 405 (1980); *Simpson* v. *United States*, 435 U.S. 6, 13-14 (1978). The United States has also maintained that, "[t]o the extent any of the 1968 enactment history is relevant in construing the meaning of Section 924(c)(1), it is the statement of Representative Poff, the provision's sponsor, that should be given the greatest weight." Br. for the United

States at 9, *Smith* v. *United States*, 508 U.S. 223 (1993) (No. 91-8674); see also Tr. of Oral Argument at 38, *Smith*, *supra* ("[W]e think that the statute should be construed in accordance with that literal language, as the original sponsor of the statute indicated, Congressman Poff."); Br. for the United States at 28, *Bailey* v. *United States*, 516 U.S. 137 (1995) (Nos. 94-7448 and 94-7492) ("Representative Poff was referring to the 'uses' prong of the original Section 924(c)" in making his statement.).[7]

The Court looked to that purpose in determining the reach of § 924(c)(1)'s "carry" prong in *Muscarello*. *Muscarello* concerned whether an individual who brought a firearm to a drug transaction, but had the firearm locked in the glove compartment or trunk of his car, rather than on his person, had violated § 924(c)(1)'s prohibition against "*carr*[*ying*] a firearm" "during and in relation to * * * [a] drug trafficking crime." 18 U.S.C. § 924(c)(1)(A) (emphasis added). In holding that such actions were covered by the statute, the Court relied on the purpose of § 924(c)(1) to "'persuade the man who is tempted to commit a Federal felony to leave his gun at home.'" *Muscarello*, 524 U.S. at 132 (quoting 114 Cong. Rec. 22,231 (1968) (Rep. Poff)). The Court held that, "[f]rom the perspective of any such purpose," it would make little sense to decline to penalize one who carries a weapon in his car rather than on his person. *Muscarello*, 524 U.S. at 132-133.[8]

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[7] Other members of Congress also expressed that purpose elsewhere in the legislative history of § 924(c)(1). See, *e.g.*, 114 Cong. Rec. 22,243-22,244 (1968) (statutes would apply to "the man who goes out taking a gun to commit a crime") (Rep. Hunt); *id.* at 22,244 ("Of course, what we are trying to do by these penalties is to persuade the criminal to leave his gun at home") (Rep. Randall); *id.* at 22,236 ("We are concerned * * * with having the criminal leave his gun at home.") (Rep. Meskill).

[8] The history of § 924(c)(1) buttresses that understanding of the statute's purpose. In 1984, Congress amended § 924(c)(1) to prohibit the use of a firearm during or in relation to a federal crime of violence. The legislative history of this amendment makes clear that Congress's purpose

Here, in contrast, it would be entirely consistent with Congress's well-established purpose to recognize that there is no "use" under § 924(c)(1) when a defendant merely receives a firearm in a drug transaction. Individuals in Watson's position, who receive (or seek to receive) guns, are in fact much "less dangerous" than those who bring firearms with them to a narcotics transaction. *Muscarello*, 524 U.S. at 133. The former have no access to the weapon until the close of the transaction, and no control over whether the weapon is loaded or otherwise "available for use" after receipt. In some cases, the individual is arrested without even taking possession of the firearm. See, *e.g.*, *United States* v. *Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005) (per curiam). In many others, including this case and *Westmoreland*, where an undercover government agent is on the other side of the transaction, the firearm is unloaded and inoperable, see 122 F.3d at 436—a situation vastly removed from the dangers that face law enforcement officers who deal with armed criminals, see *Smith*, 508 U.S. at 240. Even in transactions involving two private parties, the party who arrives, unarmed, with the drugs is unlikely to be the source of any danger. *Ibid.*

That is not to say, of course, that Congress could not enact a statute imposing punishment for seeking to obtain a gun with drugs. It is *not* at all unusual, however, for statutes to treat parties on different sides of distribution transactions differently. Compare, *e.g.*, 21 U.S.C. § 841 (criminalizing,

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was to deter the use of "dangerous weapon[s]" during or in relation to "extremely dangerous offenses." S. Rep. No. 98-225, at 312 (1983). By amending the statute to ensure that it reached all such uses of a firearm in relation to crimes of violence, Congress underscored its originally stated purpose to deter individuals from bringing a weapon into a situation where its presence could lead to an escalation in harm or violence. Such deterrence is not relevant when the individual charged under § 924(c)(1) does not have control over the weapon sufficient to raise fears of his using the weapon in a manner that would increase the likelihood of violence or destruction.

inter alia, the knowing distribution or dispensing of a controlled substance or a counterfeit substance), with *id.* § 844 (providing lesser penalties for possession of the same controlled substances). Claims that criminal statutes should be enlarged to achieve maximal possible deterrence contradict not only long-established rules of statutory interpretation and constitutional law (see pp. 39-43, *infra*), but also this Court's construction of this particular statutory provision in *Bailey*. In that case, involving defendants who, unlike Watson, *had* brought firearms to drug transactions, this Court expressly rejected arguments that Congress's general concern with the "combination" of guns and drugs warranted giving the word "use" in § 924(c)(1) a broad and unintended meaning. Here, the matter is even more clear-cut: Defendants who merely receive guns at the end of a drug transaction are not covered by Congress's stated purpose; they do not pose the dangers that concerned Congress; and they fall entirely outside any minimally acceptable reading of the language Congress enacted into law.

II. THE FIFTH CIRCUIT'S HOLDING FINDS NO SUPPORT IN "POLICY" CONSIDERATIONS OR IN *BAILEY*

Although the Fifth Circuit is not the only court to have held that a defendant's receipt of a firearm in exchange for drugs may be punished as "use" under § 924(c)(1), none of the decisions accepting that theory has suggested that this construction is required by—or even reconcilable with—the plain language of the provision Congress enacted. Indeed, two of the courts that have upheld convictions based on this theory, the First and Third Circuits, have explicitly recognized the difficulty of squaring it with the ordinary and natural understanding of "use." See pp. 12-13, *supra*.

Courts that have opted for the Government's broader and less plausible reading of § 924(c)(1) have instead relied on two reasons unrelated to the ordinary meaning of "use": (1)

policy considerations—*i.e.*, their professed inability to discern reasons for distinguishing between the conduct held punishable in *Smith* (using a gun to trade for drugs) and that here (receiving a gun in a barter transaction in exchange for drugs)—and (2) isolated language in the *Bailey* opinion they have read as indicating (or even requiring) that a defendant's receipt of a gun in a barter transaction be treated as "use" within the meaning of § 924(c)(1). Both of those rationales are mistaken.

A. Policy Considerations Cannot Override The Text Of A Criminal Statute And, In Any Event, Cut Against The Fifth Circuit's Holding

As explained in detail above, by punishing the "use" of a firearm "during and in relation to" a predicate drug offense, Congress made clear its intention to proscribe the active employment of guns but to exclude passive conduct such as the mere receipt of a firearm as payment in a drug transaction. Under these circumstances—whether or nor a court agrees with Congress's decision to limit a criminal statute's reach, enlargement by judicial interpretation is simply not an option. See *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 105 (1820) (Marshall, C.J.) (giving effect to narrow language, explaining that, even when Court could "conceive no reason why [defendant's acts] * * * should not be punished[,] * * * Congress has not made them punishable, and this Court cannot enlarge the statute."). See also pp. 39-43, *infra* (discussing rule of lenity).

Even if policy considerations were relevant, the distinctions between the two situations—actively trading a firearm for drugs and passively receiving one traded by someone else—are in fact real and substantial. In the former situation, the defendant has actively employed the firearm "during and in relation to" the drug offense; in the latter, he has not. Moreover, as noted above, Congress's premise in enacting § 924(c)(1) was that additional deterrence was

needed to persuade offenders to "leave their guns at home"—an approach that applies to individuals such as the defendant in *Smith*, but not to those such as Watson. See *Smith*, 508 U.S. 226.

Beyond that, the dangers posed by individuals who attempt to obtain guns are, as a matter of logic and practical experience, smaller than and different in kind from those posed by individuals who bring loaded guns with them—and smaller than those posed by carrying guns that, though operable and loaded, are intended for defensive use only. See *Bailey*, 516 U.S. at 141 (rejecting lower court test that had equated "'use[of] a gun with "put[ting] or keep[ing] the gun in a particular place from which one * * * can gain access to it if and when needed to facilitate a drug crime'") (quoting *Bailey*, 36 F.3d at 115); *Muscarello*, 524 U.S. at 133 (questioning whether "those who prepare, say, to sell drugs by placing guns in their cars are less dangerous * * * than those who carry handguns on their person"). Thus, "policy" considerations weigh *against*, rather than support, the interpretation of § 924(c)(1) adopted by the Fifth Circuit in this case.

B. *Bailey* Cannot Reasonably Be Read As Supporting An Expansive Construction of "Use"

Had *Smith* been this Court's only or final word on the firearm "use" proscribed under § 924(c)(1), the position taken by the Fifth Circuit might be understandable (though it still would be wrong). Indeed, as explained above (pp. 10-14, *supra*), the holding of *Smith* is sufficient in itself to require reversal here. But to whatever extent *Smith* left open the possibility of a broadly inclusive "interpretation" of "use," that door was firmly shut by *Bailey*. See *Stewart*, 246 F.3d at 731 (explaining that pre-*Bailey* decision sustaining conviction based on receipt of guns in an exchange was no longer good law); *Westmoreland*, 122 F.3d at 436 (predicting that Fifth Circuit would, in the wake of *Bailey*, disavow case law

treating receipt as punishable "use"). As these decisions emphasize, the *Bailey* opinion backed away from some of the broader language that had appeared in *Smith*. See, *e.g.*, *Stewart* 246 F.3d at 731 (describing *Bailey* as having limited *Smith* to the "particular use" at issue in that case) (quoting 516 U.S. at 140); see also *Bousley* v. *United States*, 523 U.S. 614, 620 (1998) (recognizing *Bailey* had changed the contours of what § 924(c)(1) was understood to have "made criminal"). Compare also *Smith*, 508 U.S. at 238 (indicating that "potential" active use and "facilitati[ve]" possession would likely be punishable) with *Bailey*, 516 U.S. at 144 (holding § 924(c)(1) "use" prohibition inapplicable in both circumstances). *Bailey*'s recognition that even dangerous possession may not be "use" for purposes of the statute and its affirmative holding that "active employment" must be present in all cases confirm that receipt of a gun through barter does not qualify as "use."

Remarkably, some lower courts that had equated gun receipt with "use" have not only adhered to that conclusion in the wake of *Bailey*, but have even suggested (as did the Government in opposing certiorari, see Br. in Opp. 5-6), that *Bailey* buttresses their interpretation. In particular, these courts have relied on *Bailey*'s statement (citing *Smith*) that "bartering * * * a firearm" constitutes punishable "use," as well as the opinion's passing reference to instances where a gun is an "operative factor" in drug dealing. See *Bailey*, 516 U.S. at 143. Neither of these aspects of *Bailey* lends any support to the decision below.

1. Bailey*'s Reference To "[B]artering * * * [A][F]irearm" Does Not Support Treating Receipt Of A Firearm As "Use"*

In *Bailey*, this Court "illustrat[ed] the activities that fall within the definition of 'use'" under § 924(c)(1). 516 U.S. at 148. "The active-employment understanding of 'use,'" it noted, "certainly includes brandishing, displaying, *bartering*,

striking with, and, most obviously, firing or attempting to fire a firearm." *Ibid.* (emphasis added). Thus, although *Bailey* lists "bartering * * * a firearm" as an example of a "use," it does so only insofar as that "bartering" constitutes "active employment"—*i.e.*, bartering *with* an item. Several lower courts have misconstrued this reference as establishing that anyone engaged in the *general activity* of bartering "uses" a gun, so long as the gun is somehow involved in the transaction. In so doing, those courts turn *Bailey*'s language—and, more importantly, its core holding—upside down. That construction of the phrase ignores the context in which this Court discussed the term, violates *Bailey*'s active-employment test, and runs afoul of the conventional understanding of the word "barter" as it was used in *Bailey*.

a. This Court's inclusion of "bartering * * * a firearm" in its list of "active employment" conduct is a clear reference to the Court's earlier decision in *Smith* and must be read accordingly. *Smith* presented the question whether a defendant who trades a gun to obtain drugs has "used" the gun. The Court held, over the dissent of Justice Scalia—joined by Justices Stevens and Souter—that the defendant had "used" a firearm under § 924(c)(1) because, "[b]y attempting to trade his [gun] for the drugs, [the defendant] 'used' or 'employed' it as an item of barter to obtain cocaine; he 'derived service' from it because it was going to bring him the very drugs he sought." 508 U.S. at 229. Two years later in *Bailey*, clarifying that "use" in § 924(c)(1) is limited to "active employment," the Court affirmed that the result in *Smith* "adhered to an active meaning" of "use," because the person bartering with a gun employs it. 516 U.S. at 148. In its extensive discussion of *Smith*, the Court in *Bailey* again referred to "bartering" in the context of the particular facts in *Smith*—bartering a firearm for drugs. See *ibid.* ("In *Smith*, it was clear that the defendant had 'used' the gun; the question was whether *that particular use (bartering)* came within the meaning of § 924(c)(1).") (emphasis added). In addition, the

Court made clear that *Smith* addressed only the "question whether the barter of a gun *for drugs* was a 'use.'" *Id.* at 143 (emphasis added). See *United States* v. *Cox*, 324 F.3d 77, 83 (2d Cir. 2003) (noting that receipt of a firearm during a drug transaction is a "quite distinct question" from that addressed in *Smith* and *Bailey*).

This Court's statement in *Bailey* that "bartering * * * a firearm" constitutes "active employment" immediately follows its discussion of *Smith*. The reference to bartering must therefore be read in its proper context, referring to the specific conduct at issue in *Smith*—bartering *with* a firearm in exchange for drugs. See *Montano*, 398 F.3d at 1283 ("*Smith* did not hold that bartering, in general, constituted 'use' of a firearm; instead, the opinion states that bartering *with a firearm* constitutes use"); see also *Stewart*, 246 F.3d at 732. The Court used the term "barter" in a similar fashion elsewhere in the *Bailey* opinion, referring to an offender who "barters *with* a firearm without handling it." 516 U.S. at 146 (emphasis added). When examined in context, *Bailey*'s reference to "bartering * * * a firearm" applies only to bartering a firearm in exchange for drugs. It cannot reasonably be applied to the very different circumstances of a defendant who receives a firearm as a result of a barter exchange.

b. The exceedingly broad interpretation of *Bailey*'s "bartering * * * a firearm" language is wholly at odds with the holding and central point of *Bailey*—that "use" prosecutions under § 924(c)(1) must be limited to defendants who "actively employ" firearms. As explained above (pp. 9-27, *supra*), however, mere receipt of a firearm is not "active employment" of that firearm. See *Stewart*, 246 F.3d at 731 ("[N]othing in a person's acceptance of a gun embodies the active employment demanded by the Court in *Bailey*."); see also *Montano*, 398 F.3d at 1284 (holding that a defendant who initiated drugs-for-gun exchange did not "actively employ" a firearm); *United States* v. *Layne*, 192 F.3d 556, 570 (6th Cir. 1999) (holding that even if defendant had

requested the firearm at issue, government failed to prove that defendant actively employed it). *Bailey*'s "bartering * * * a firearm" language must be construed in a manner consistent with the active employment test that this Court announced in the very same opinion. Although bartering a firearm for drugs meets *Bailey*'s active employment test, see *Bailey*, 516 U.S. at 148, a defendant who barters drugs—or any other item—in exchange for a gun cannot be said to have actively employed the gun merely by virtue of receiving it at the conclusion of the transaction.

Moreover, the approach taken by those courts of appeals that support the meaning of "use" adopted by the Fifth Circuit reflects a flawed reading of precedent and a mode of analysis long rejected by this Court. Fixating on the single reference to "bartering" within the *Bailey* decision, those courts "tak[e] * * * [an] unelaborated reference * * * out of context," and give that language "a meaning both unsupported by the holding and inconsistent with the spirit of [the] decision." *Bryson* v. *United States*, 396 U.S. 64, 70 n.9 (1969); see also *United States* v. *Flores-Montano*, 541 U.S. 149, 152 (2004) (chiding the court of appeals for seizing upon a single word in a prior decision to support the creation of a new legal standard); *Harbor Tug & Barge Co.* v. *Papai*, 520 U.S. 548, 557 (1997) ("The Court of Appeals majority interpreted the words 'particular employer' outside the limited discussion in which we used them and, as a result, gave the phrase a meaning opposite from what the context requires."); *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 540 (1985) ("[W]e think that the Court of Appeals misapprehended the significance of that phrase in the context in which it was used in [the prior decision]."); *United States* v. *Frady*, 456 U.S. 152, 164 (1982) ("[T]he Court of Appeals pointed to a single phrase to be found in our [earlier opinion]. * * * Seizing on this phrase, the Court of Appeals" reached an erroneous judgment regarding the correct standard of review.). As Justice Harlan cautioned in *Bryson*, extracting isolated words

or phrases from this Court's opinions is a perilous enterprise. Here, that flawed approach led lower courts to stretch § 924(c)(1)'s "use" prong well beyond its ordinary and natural meaning.

In attaching paramount significance to a single word in the *Bailey* opinion, those lower courts effectively read that decision to have announced two distinct rules—first, that any component of bartering (whether one actively gives or passively receives) necessarily constitutes "use" and, second, that "active employment" is a necessary element of "use." But the Court in *Bailey* announced only a single rule: "use" for the purposes of § 924(c)(1) requires "active employment." All language in *Bailey* must be understood in the context of that core holding, and efforts to construe language in the opinion differently fundamentally betray that holding as well as the logic behind it. As this Court explained, a defendant "uses" a firearm during and in relation to a drug transaction only when he actively employs that firearm, and such active employment may sometimes be found in barter transactions where, as in *Smith*, the defendant barters with a firearm. See *Bailey*, 516 U.S. at 143. It is simply incorrect, however, to conclude that any participation in a bartering transaction in which drugs and firearms are involved automatically places both parties in violation of § 924(c)(1) for having "used" a firearm in the transaction.

c. Courts that read *Bailey*'s "bartering * * * a firearm" language to encompass receipt make the additional mistake of conflating the general activity of "bartering" with the specific act of "bartering a firearm" or any other particular item. While the former, intransitive use of the word broadly encompasses the activities of all parties in a barter transaction, the latter, transitive sense of "bartering"—which this Court used in *Bailey*—is narrow, referring only to action by the person who is bartering away *something* (such as a firearm) in exchange for *something else*.

This critical distinction between the two senses of the term "bartering" can be illustrated by a simple example: If a farmer provides livestock to a merchant, who in return provides the farmer with flour and sugar, it would be proper to say that both the farmer and the merchant "barter." In addition, it would be appropriate to state that the farmer was "bartering the livestock." It would not be valid, however, to say that the farmer was "bartering the flour and sugar." That understanding of the term would run contrary to conventional usage. Similarly, the statement "I bartered a firearm today" can mean only one thing—the speaker exchanged his firearm for certain goods or services. That statement cannot reasonably be understood to mean that the speaker obtained a gun through a barter transaction. This commonsense definition of "barter" is supported by the opinions of this Court, which have repeatedly referred to bartering a particular item to mean *giving away* that object. See, *e.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 889 (1996) (plurality opinion); *Green* v. *United States*, 355 U.S. 184, 193 (1957); *Ill. Cent. R.R. Co.* v. *City of Chicago*, 176 U.S. 646, 659 (1900).

2. Bailey*'s "Operative Factor" Language Does Not Support The Decision Below*

In *Bailey*, this Court stated that "§ 924(c)(1) requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." 516 U.S. at 143. In that sentence, the term "operative factor" is defined by the "active employment" requirement: It is the defendant's "active employment" of the firearm that makes the firearm an "operative factor" in relation to the predicate offense. For instance, if the firearm is brandished, fired, or displayed, then it is actively employed by the defendant and thus rendered an operative factor in the predicate offense. The Sixth Circuit has made this very point: "When a firearm is 'displayed' in a drug trafficking offense, the firearm becomes an operative factor in relation to the predicate

offense." *United States* v. *Stotts*, 176 F.3d 880, 888 (1999). The converse understanding, in which the firearm's role as an "operative factor" *determines* whether it was "actively employed," would, in effect, contradict the very holding of *Bailey* and also render the "carry" and "possession in furtherance" portions of the statute superfluous.

Nevertheless, several of the courts of appeals have adopted this flawed interpretation. The Fifth Circuit, for example, first determined that firearms were an operative factor in the predicate offense and *then* concluded that the defendant necessarily actively employed those firearms: "By bartering drugs for firearms, [the defendant] 'actively employed' the firearms, because they were an 'operative factor' in the drug trafficking offenses. [The defendant] thus 'used' the firearms within the meaning of § 924(c)(1)." *Ulloa*, 94 F.3d at 956; see also *Cotto*, 456 F.3d at 30 (holding that the defendant "actively employed firearms by making them an operative factor in that crime").[9]

That reading of "operative factor" essentially miscasts *Bailey*'s requirement of "active employment" as one of "but-for" causation. Such an interpretation would not only nullify *Bailey*'s "active employment" understanding of "use," but also would swallow the "carry" and "possession in furtherance" prongs of the statute. If (1) the mere *presence* of something without which the drug transaction might not be completed renders that item an "operative factor"; and (2) anything considered an "operative factor" is *ipso facto* "used," then *Bailey*'s careful analysis of the term's limited meaning was a hollow exercise. Imagine, for example, that the defendant in *Bailey* always kept a gun in the trunk of his

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[9] Indeed, the Government has also focused on the term "operative factor" to the exclusion of the "active employment" requirement of *Bailey*. See Br. in Opp. 6; Br. for the United States at 14, *United States* v. *Erickson*, 134 F.3d 379 (9th Cir. 1997) (No. 97-35574) ("*Bailey* defines 'use' to mean 'operative factor.'") (citations omitted).

car while selling drugs and, though never removing or referring to the gun, would not sell drugs without its presence. Under the First and Fifth Circuits' analysis, since the defendant would never have engaged in drug trafficking unless the gun was invisibly present, it would be an "operative factor" in the offense and the defendant would have thus "used" a firearm in violation of § 924(c)(1). That result is entirely inconsistent with this Court's refusal in *Bailey* to equate possession of a firearm with "use" of a firearm under § 924(c)(1). See also *Jones*, 529 U.S. at 856 (citing *Bailey* as "rejecting the Government's argument that a gun is 'used' whenever its presence 'protects drugs' or 'emboldens' a drug dealer"). Following the 1998 amendment to § 924(c)(1), that hypothetical defendant's actions might, of course, qualify as possession "in furtherance." The First and Fifth Circuits' reading of *Bailey*'s "operative factor" language, however, would classify that behavior as "use," thereby rendering the "possession in furtherance" prong superfluous.

The lower courts' "operative factor" test not only violates *Bailey*, it also renders much of § 924(c)(1)'s "carry" provision superfluous. As this Court stated in *Muscarello*, *Bailey* limited "use" of a firearm to "active employment" because "'Congress * * * intended each term to have a particular, non-superfluous meaning.' A broader interpretation of 'use,' * * * would have swallowed up the term 'carry.'" 524 U.S. at 136 (citations omitted). The Court noted that "[c]arry also retains an independent meaning, for, under *Bailey*, carrying a gun in a car does not necessarily involve the gun's 'active employment.'" *Ibid.* In *Muscarello*, this Court found that the phrase "carries a firearm" in § 924(c)(1), in addition to criminalizing the "carrying of firearms on the person," "applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies." *Id.* at 126-127. Thus, the two defendants in *Muscarello* who were transporting firearms in the trunk of

their car on the way to a drug-sale point, intending to steal drugs from the drug sellers, "carried" the firearms in violation of § 924(c)(1). Under the First and Fifth Circuit's "operative factor" test, however, since those defendants needed their weapons to steal the drugs from the drug sellers, and the defendants would not have committed the drug offense without their weapons, those weapons were an "operative factor" in the drug offense and thus "used" in violation of § 924(c)(1).

In fact, this Court squarely rejected the equivalent of the First and Fifth Circuit's "operative factor" test in *Bailey* itself. There, the D.C. Circuit had required the government to show (1) a "nexus * * * between a particular drug offender and the firearm," and (2) "that the gun facilitated the predicate offense in some way." *Bailey*, 36 F.3d at 108 (quotations omitted). The court used a proximity and accessibility test to determine whether the government had met that burden. *Id.* The government argued that it had "to present evidence only that the defendant possessed a firearm and that the firearm in some way facilitated the drug crime." *Id.* at 110. As this Court noted in *Bailey*, the government's interpretation of "facilitation" (and thus, "use") "include[d] even the action of a defendant who puts a gun into place to protect drugs or embolden himself." *Bailey*, 516 U.S. at 145. This Court rejected that definition of "use." *Ibid.*

The "facilitation" argument advanced by the government and adopted by the D.C. Circuit in *Bailey*, but rejected by this Court, is the same in substance as the "operative factor" test of the First and Fifth Circuits. Those courts have held, in so many words, that because the firearm (arguably) "facilitated" the offense—because the defendant received the firearm to close the transaction—it is an "operative factor" and thus "used." This interpretation is directly at odds with *Bailey*'s "active employment" requirement.

The only interpretation of *Bailey* consistent with both the holding of *Bailey* and the text of the statute is that there is no independent "operative factor" shortcut for establishing unlawful "use." A defendant may be prosecuted under § 924(c)(1)'s "use" prong only if he *actively employs* the firearm. Watson did not do that.

III. THE FIFTH CIRCUIT'S DECISION VIOLATES THE RULE OF LENITY AND IGNORES THE IMPORTANT CONSTITUTIONAL PRINCIPLES THAT REQUIRE AMBIGUITIES TO BE RESOLVED IN PETITIONER'S FAVOR

For the reasons set forth above, the reading of § 924(c)(1) adopted by the Sixth, Seventh, Eleventh and D.C. Circuits (Pet. 8)—under which receipt of a firearm alone, without active employment, may not be punished as "use"—is the only permissible construction of the statute. As this Court has long emphasized, the strong rule against "departure from statutory language," *Crandon* v. *United States*, 494 U.S. 152, 168 (1990) (quoting *Crooks* v. *Harrelson*, 282 U.S. 55, 60 (1930)), becomes a categorical prohibition when the law is one imposing criminal punishment and the argued-for departure from plain meaning would expand the statute's sweep. Thus, nearly two centuries ago, Chief Justice Marshall explained that even when the Court could "conceive no reason why [defendant's acts] * * * should not be punished[,] * * * Congress has not made them punishable, and this Court cannot enlarge the statute." *Wiltberger*, 18 U.S. (5 Wheat.) at 105.

But even if the reading we urge were not compelled by the statutory text, and was instead but one of several reasonable alternative interpretations, the Fifth Circuit's decision must still be reversed. It is well established that "ambiguous criminal statute[s]" must "be construed in favor of the accused." *Staples* v. *United States*, 511 U.S. 600, 619, n.17 (1994); see also *United States* v. *Granderson*, 511 U.S.

39, 54 (1994); *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."); *Leocal* v. *Ashcroft*, 543 U.S. 1, 10-12 & n.8 (2004) (finding the statute clear, but noting that "[e]ven if [it] lacked clarity * * *, we would be constrained to interpret any ambiguity in the statute in [the defendant's] favor"); *United States* v. *R.L.C*, 503 U.S. 291, 305 (1992) (plurality opinion) (holding that no "ambiguity survive[d]. If any did, however, we would choose the construction yielding the shorter sentence by resting on the * * * rule of lenity"); *Tanner* v. *United States*, 483 U.S. 107, 131 (1987) (finding statutory language unambiguous, but noting that "the Government has presented us with nothing to overcome our rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'") (quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)).[10]

As important as this rule of construction are the constitutional principles that underlie it. Cf. *Castillo* v. *United States*, 530 U.S. 120, 124, 131 (2000) (rejecting government's argument that machine gun use under § 924 should be treated as a sentencing factor, rather than an offense, citing the rule of lenity and noting that doing so would "give rise to significant constitutional questions"); *Jones* v. *United States*, 526 U.S. 227 (1999) (same). As the Court has explained, the rule against reading ambiguous provisions expansively is rooted in: (1) the principle, manifest in the text and structure of the Constitution, that "the legislature, not the Court, * * * is to define a crime, and

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[10] See also *Hughey* v. *United States*, 495 U.S. 411, 422 (1990) (rejecting the government's proffered interpretation as "implausible," but noting that "[e]ven were the statutory language * * * ambiguous, longstanding principles of lenity" would compel its rejection); *Crandon*, 494 U.S. at 168 ("To the extent that any ambiguity * * * remains, it should be resolved in the [defendant's] favor.").

ordain its punishment," *Wiltberger*, 18 U.S. (5 Wheat.) at 95; see *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); *Bousley*, 523 U.S. at 620-621 ("[U]nder our federal system it is only Congress, and not the courts, which can make conduct criminal."); and (2) notions of "fair warning" that are at the heart of Due Process. See *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.); accord *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964) ("[U]nexpected and indefensible" constructions of statute violate Due Process.) (internal quotation marks omitted); cf. *Bousley*, 523 U.S. at 620 (holding that defendant who pleaded guilty to firearm "use" before *Bailey* could challenge conviction under 28 U.S.C. § 2255, noting "significant risk" that defendant was convicted of "an act that the law does not make criminal") (quoting *Davis* v. *United States*, 417 U.S. 333, 346 (1974)). See generally *United States* v. *Aguilar*, 515 U.S. 593, 600 (1995) (explaining that courts' "traditional * * * restraint in assessing the reach of a federal criminal statute [reflects] both * * * deference to the prerogatives of Congress, and * * * concern that a fair warning should be given to the world in language that the common world will understand") (citing *Dowling* v. *United States*, 473 U.S. 207 (1985) and *McBoyle*); *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988) (identifying "minimiz[ing] the risk of selective or arbitrary enforcement" as another "purpose[] underlying the rule of lenity"). "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404 U.S. 336, 348 (1971). The rule "embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Ibid.* (quoting Henry Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 196, 209 (1967)).

Each of those concerns would be implicated were the Court to embrace the Fifth Circuit's expansive and textually insupportable construction of § 924(c)(1). The penalties are substantial. No ordinary person would understand "use" to mean receipt in a barter transaction. Cf. *Zuni Pub. Sch. Dist. No. 89* v. *U.S. Dep't of Educ.*, 127 S. Ct. 1534, 1557 (2007) (Scalia, J, dissenting) ("Citizens arrange their affairs * * * on the basis of the law as it is written and promulgated."). Indeed, an individual who conscientiously reviewed the full range of materials on which courts rely in interpreting statutes—authoritative judicial construction, dictionaries, surrounding statutory provisions, and legislative history—would conclude that the statute does not reach individuals, like Watson, who never actively employed a gun and whose possession was at most fleeting and fully controlled by the government in order to minimize danger. Not only did the legislature understand the differences between firearm "use" and terms such as "possession," "receipt," "acquisition," "intent to use," and "involvement"—all of which appear in surrounding provisions—but Congress's adherence to the settled understanding of "use" came after specific consideration of more expansive alternative approaches. See H.R. Rep. No. 105-344, at 14 (noting that the Justice Department had favored alternative legislation, H.R. 810, which would have amended § 924(c)(1) by deleting "use" and "carry" and replacing them with a single "possession" proscription); *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (explaining that the "significant expansion of the law's coverage [sought by the government] must come from Congress, and not from the courts"). Finally, the power of government agents in cases like this one to control whether unloaded guns are handed over—and to steer individuals toward using drugs as currency instead—highlight that "arbitrary enforcement," *Kozminski*, 487 U.S. at 952, is a real and serious danger.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 06-571

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In the Supreme Court of the United States

OCTOBER TERM, 2007

MICHAEL A. WATSON, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
(BATON ROUGE)

CRIMINAL DOCKET FOR CASE #:
3:04-cr-00186-FJP-DLD-ALL

Filing Date	#	Docket Text
		* * * * *
11/15/2004 (p.11)	1	COMPLAINT as to Michael A. Watson [3:04-m-75] (sah) (Entered: 11/15/2004)
		* * * * *
12/1/2004 (p.59)	9	INDICTMENT as to Michael A. Watson (1) count(s) 1, 2, 3 (Preliminary Examination cancelled) (sah) (Entered: 12/6/2004)
		* * * * *
12/16/2004		PLEA of Not Guilty. Michael A. Watson (1) count(s) 1, 2, 3; Court accepts plea (nlt) (Entered: 12/17/2004)
		* * * * *
12/17/2004	12	Minute entry as to Michael A. Watson: 12/16/04. 5A and Arraignment held * * * not guilty plea entered ... dft released on previous conditions (signed by Mag. Judge Christine Noland) (nlt) (Entered 12/17/2004)

		* * * * *
3/30/2005	33	MINUTE ENTRY for proceedings held before Judge Frank J. Polozola: Re-arraignment as to Michael A. Watson held on 3/30/2005. Plea agreement filed into record. Plea entered by Michael A. Watson (1) Guilty Count Complait 1, 2, 3 ... Court accepts the GUILTY PLEA .. Cout orders a PSR ... Dft remanded to the custody of the USM (Court Reporter E. Champion) (SAH,) (Entered: 4/1/2005)
3/30/2005	34	PLEA AGREEMENT filed into record as to Michael A. Watson (SAH,) (Entered: 4/1/2005) * * * * *
11/17/2005 (p. 193)	48	MINUTE ENTRY for proceedings held before Judge Frank J. Polozola: Sentencing and a hearing on dft's objection to presentence report. held on 11/17/2005 as to Michael A. Watson ... The Court imposes sentence. The defendant advised the Court that he would like to enter a Notice of Appeal ... Dft remanded to the custody of the USM (Court Reporter E. Champion) (SAH,) (Entered: 11/30/2005)
11/29/2005	47	NOTICE OF APPEAL of the judgment rendered on 11/17/05 by Michael A. Watson Copy of NOA mailed to USCA. K. Koch and R. Piedrahita Appeal Record due by 12/14/2005 (HCL) (Entered: 11/30/2005)

		* * * * *
11/29/2005	50	JUDGMENT as to Michael A. Watson (1), 1, 2, 3, IMPRISONMENT for a total term of 202 months on count 1, and 120 months on count 3 to run concurrently, 60 months on count 2 to run consecutively to counts 1 and 3, for a total term of 262 months. SUPERVISED RELEASE to run for a term of 3 years on counts 1, 2, and 3 to run concurrently ... ASSESSMENT of $300.00 ... (2 certified copies each sent to USM, USA, & USPO). Signed by Judge Frank J. Polozola on 11/29/2005. (SAH,) (Entered: 11/30/2005)
11/30/2005		Transmission of Notice of Appeal and Docket Sheet as to Michael A. Watson to US Court of Appeals re [47] Notice of Appeal. * * * (HCJ,) (Entered: 11/30/2005)
12/7/2005	51	TRANSCRIPT REQUEST by Michael A. Watson for proceedings held on 3/30/05 -- Guilty Plea before FJP, re [47] Notice of Appeal (HCJ,) (Entered: 12/7/2005)
12/14/2005	52	TRANSCRIPT filed as to Michael A. Watson for dates of Plea Hearing held on 3/30/05 before FJP, re [47] Notice of Appeal. Court Reporter EOC. (HCJ,) (Entered: 12/14/2005)
		* * * * *
8/17/2006	53	MANDATE of USCA (certified copy) as to Michael A. Watson re [47] Notice of Appeal. Judgement of the District Court is

		AFFIRMED. (HCJ.) (Entered: 8/22/2006)
9/29/2006	54	TRANSCRIPT of Sentencing Hearing as to Michael A. Watson held on 11/17/05 before Judge FJP. Court Reporter EOC. (HCJ.) (Entered: 09/29/2006)
3/29/2007	55	Transmitted Record on Appeal as to Michael A. Watson to US Supreme Court re [47] Notice of Appeal. Per request received from 5th Circuit Court of Appeals (HCJ.) (Entered: 03/29/2007)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COURT OF APPEALS DOCKET #: 05-31094
USA v. Watson

Appeal from: Middle District of Louisiana, Baton Rouge

Filing Date	Docket Text
12/15/05	Direct criminal case docketed. NOA filed by Appellant Michael A. Watson. [05-31094] (dms) * * * * *
3/6/06	Appellant's Brief filed by Appellant Michael A. Watson. * * * (rsm) * * * * *
4/18/06	Appellee's Brief filed by Appellee USA. * * * (gmr)
4/21/06	Record on appeal filed. SEALED: 2 envs. (1-PSI & SOR) (1-Doc #27). [05-31094] ROA ddl satisfied. (gmr)
5/18/06	Briefing Complete. [05-31094] Reply brief ddl canceled. (pok)
7/25/06	Opinion filed. Mandate pull date is 8/15/06. [05-31094] (rmf)
7/25/06	Judgment entered and filed. [05-31094] (rmf)

8/16/06	Mandate issued. Approved BOC Issued? (Y/N)?: n [05-31094] Mandate pull date satisfied. (ina)
8/16/06	Record on appeal returned to USDC. Volumes: 1 SEALED: 2 envs. * * * [05-31094] (ina)
11/17/07	Supreme Court notice that petition for certiorari was filed in 10/13/06 by Appellant Michael A. Watson. Supct No.: 06-571 [05-31094] (cav)
3/14/07	Supreme Court order received granting petition certiorari [5597970-1] by Appellant Michael A. Watson on 02/26/07. [05-31094] (cav)
3/28/07	Certified record on appeal transmitted to United States Supreme Court. 5th Cir. Vols: 1 DCt. Vols: 0 Supplemental Vols: 0 Exhibits: 0 [05-31094] (cmb)
3/28/07	Record on appeal requested from the district court for the Supreme Court. [05-31094] (cmb)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

INDICTMENT FOR DISTRIBUTION OF OXYCODONE HYDROCHLORIDE, USE OF A FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME, AND POSSESSION OF A FIREARM BY A CONVICTED FELON

UNITED STATES OF AMERICA	: CRIMINAL NO.
	: 04-186-B-M3
versus	:
	: 21 U.S.C. § 841(a)(1)
MICHAEL A. WATSON	: 18 U.S.C. § 924(c)(1)(A)
	: 18 U.S.C. § 922(g)(1)

THE GRAND JURY CHARGES:

COUNT ONE

On or about November 12, 2004, in the Middle District of Louisiana, **MICHAEL A. WATSON**, defendant herein, knowingly and intentionally did distribute oxycodone hydrochloride, also known as OxyContin, a Schedule II controlled substance.

The above is a violation of Title 21, United States Code, Section 841(a)(1).

COUNT TWO

On or about November 12, 2004, in the Middle District of Louisiana, **MICHAEL A. WATSON**, defendant herein, knowingly

did use an Israeli Military Industries, Desert Eagle, .50 caliber semiautomatic pistol, bearing serial number 312000803, during and in relation to the drug trafficking crime described in Count One.

The above is a violation of Title 18, United States Code, Section 924(c)(1)(A).

COUNT THREE

On or about November 12, 2004, in the Middle District of Louisiana, MICHAEL A. WATSON, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year (a felony), knowingly did possess:

a) A Ruger, Model 10/22, .22 caliber rifle, bearing serial number 236-06166;

b) A Ruger, Model 10/22, .22 caliber rifle, bearing serial number 249-27029;

c) A Winchester, Model 67, .22 caliber single-shot rifle;

d) A Bryco, Model 48, .380 caliber pistol, bearing serial number 559071; and

e) A Winchester, Model 37, 16 gauge single-shot shotgun,

which firearms were previously imported in interstate commerce.

The above is a violation of Title 18, United States Code, Section 922(g)(1).

UNITED STATES OF AMERICA, by

/s/
DAVID R. DUGAS
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF LOUISIANA

/s/
ROBERT W. PIEDRAHTA
ASSISTANT U.S. ATTORNEY

A TRUE BILL

/s/
GRAND JURY FOREPERSON

12-01-04
DATE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	:	
PLAINTIFF	:	CRIMINAL ACTION NO.
vs.	:	04-186-B
	:	MARCH 30, 2005
MICHAEL A. WATSON	:	
DEFENDANT	:	2:15 P.M.

TRANSCRIPT OF PLEA HEARING

BEFORE THE HONORABLE FRANK J. POLOZOLA

UNITED STATES DISTRICT JUDGE

APPEARANCES:

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REPORTED BY: ESTELLA O. CHAMPION, CRR, RDR.

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Q. Okay. Do you have any questions about your appeal rights?

MR. KOCH: Judge, there is one little, just unusual twist. I don't know if there is legal significance. But the defendant has reserved the right to appeal the sufficiency of

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the factual basis, and that's laid out in the first sentence there. That has to do with when you get into the stipulation of facts.

THE COURT: Thank you for telling me.

And Mr. Koch is right, there's one additional item you have reserved your right to appeal on, and I'm not sure -- I won't even accept a guilty plea unless there's a sufficient factual basis.

MR. KOCH: It's -- what it has to with, Judge, is there's a split in the circuits. Factually the charge has to do with Mr. Watson transferring drugs in exchange for a firearm. In all the circuits, if you trade a gun for drugs, that's a violation. In half the circuits, though, if you trade drugs for a gun, that's been found not to be under 924(c). In the Fifth Circuit it is.

THE COURT: Then this would be a conditional plea under Rule 11?

MR. PIEDRAHITA: No.

MR. KOCH: Judge, the law in this circuit is that factually what he has done falls within 924(c); no question about it.

THE COURT: I know. But it seems to me that what's happening here is, if you reserve your right to appeal whether or not there's a sufficient factual basis for the plea, then that's conditional -- that would be a conditional plea under

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Rule 11, because you're reserving the right to appeal. Because if I'm reversed, then it comes back, and he has a right, then, to withdraw his guilty plea and enter a not-guilty plea.

MR. PIEDRAHITA: Your honor, if you look under Rule 11(a), it goes on to say that, Conditional Plea, Rule 11(a)(2), it says: "With the consent of the Court and the government, defendant may enter a conditional plea -- which is what the Court is talking about -- plea of guilty or nolo contendere, reserving the right to have the appeal court review an adverse determination." There's been no adverse determination in this case.

THE COURT: Well, there's going to be an adverse

determination because, if I find there's a sufficient factual basis as a matter of law, and then they take an appeal, that's exactly what you're doing.

MR. PIEDRAHITA: If you read *adverse determination* to mean that the defendant has filed a motion or the defendant is objecting to the factual basis --

THE COURT: But I'm assuming that, under the terms of the plea agreement, you all have agreed that this is an issue that can be reserved for appeal, which is a conditional plea, no matter how you word it, I mean.

You know, if the government is satisfied --

MR. PIEDRAHITA: We're satisfied.

THE COURT: Let me put it this way: If the

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government is satisfied that this defendant has a right to appeal my decision saying that there's a sufficient factual basis for the plea, it has to be under Rule 11. There's no other way. Because otherwise you waive everything, all challenges to the sufficiency of the evidence and what have you, when you plead guilty. So it has to go up to the circuit as a Rule 11.

Otherwise, the guilty plea itself would wipe out any challenges to amount of proof, any challenges to like motions

to suppress. The only thing that you would reserve -- the only thing that you always could raise would be the Court didn't have jurisdiction. But that's not an issue here.

MR. PIEDRAHITA: Well, then, your Honor, the United States consents to -- and, of course, the Court has to as well under the rule -- but the United States consents to allowing the defendant the opportunity to appeal the sufficiency of the factual basis under --

THE COURT: We're only talking about Count 1.

MR. PIEDRAHITA: -- as to Count 1. I was going to continue, as to Count 1.

Under the Fifth Circuit, your Honor, the Fifth Circuit, as Mr. Koch has stated, allows that the factual basis that is set forth is indeed a conviction for 924(c) in the Fifth Circuit. It may happen that the en banc court may decide otherwise, or it may very well be that the Supreme Court may resolve the

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conflict. But to the extent --

THE COURT: Right now the law in the circuit would be that, if the facts presented that there were guns --

MR. KOCH: Drugs out, guns in.

THE COURT: -- drugs out, guns in, that a conviction in the Fifth Circuit.

MR. KOCH: Yes, sir.

THE COURT: And I'm bound by the Fifth Circuit law.

MR. KOCH: Yes, sir.

THE COURT: And the only way -- God bless you -- the only way this could ever be changed here would be, one, as you say, en banc decision; but Number 2, the Supreme Court, if the Supreme Court wanted to resolve a conflict between the circuits, if there are conflicts.

But, what I'm saying, I'm just trying to be fair.

MR. PIEDRAHITA: Yes, sir.

THE COURT: My opinion is that unless this goes up to the circuit as a Rule 11 conditional plea on Count 1, I don't think the Fifth Circuit would accept jurisdiction to consider that appeal because it would just be a waiver; because when you plead guilty, you're saying: "I'm guilty as a matter of law and facts." Because one of the questions I'm going to ask him is is he guilty: "Are you pleading guilty because you're in fact guilty of the charge?"

MR. PIEDRAHITA: We'll agree to that, your Honor.

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MR. KOCH: Judge, it has to do with Count 2, actually. It's the 924(c).

MR. PIEDRAHITA: Count 2.

THE COURT: Yes, it's Count 2. It's not one.

We'll make sure that the minute entry reflects -- I'm not going to oppose this. You know, I mean, my only concern in getting involved on this is -- and frankly, if the intent of the parties was to reserve your right to appeal, I think we ought to include Rule 11.

MR. PIEDRAHITA: Thank you.

THE COURT: Today has been a bad day for me. I've gotten 11(c) binding pleas, now a conditional plea. This is a true Section B day.

MR. PIEDRAHITA: Thank you.

THE COURT: I don't know what the next one is going to be, but in any event . . .

BY THE COURT:

Q: Do you understand on Count 2, even though you're pleading guilty, okay, and even though the law in the Fifth Circuit would support what I'm about ready to do in a few minutes, you and the government have agreed that you still can appeal on whether or not that law should be valid in this circuit only on the charge on Count 2? Do you understand that?

A: Yes, sir.

Q: And the Court -- I have discretion to say, "No.

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you can't do it. I won't accept the plea. You've got to go to trial on it." Or I can say, "I will agree to let you enter a conditional plea on Count 2 under Rule 11," and that's what I'm going to do. I'm going to let you reserve your right to appeal. And the only reason for the colloquy or discussion between me and your lawyers is I wanted to make that, if the intent of your lawyer and the government was to allow you to take the appeal, that the appropriate section of Rule 11 -- and I have to get it out - it's eleven – Did you just have it?

MR. PIEDRAHITA: Yes, sir.

THE COURT: 11(e)?

MR. PIEDRAHITA: 11, 11(a)(2), conditional plea.

THE COURT: 11(a)(2)?

MR. PIEDRAHITA: Yes, sir.

THE COURT: Okay. Thank you.

BY THE COURT:

Q. All right. Do you understand that? That's to your benefit.

A. Yes, sir.

Q. Okay. * * *.

* * * * *

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Q. Okay. Now, Paragraph 12, you all stipulated to certain facts.

Have you had a chance to read the provisions of paragraph 12? Because these are very important, because on the basis of these facts, I'm going to decide whether to accept your guilty plea or not. I'm also going to use this in determining what your sentence is going to be. Do you understand that?

A. Yes, sir.

Q. So have you read this, or do you want me to read it to you now?

A. We done read it once.

MR. KOCH: This is what you and I went over.

THE DEFENDANT: We read it.

BY THE COURT:

Q. Are there any changes, corrections or additions you want to make to the provisions in those paragraphs?

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A. I don't think so.

Q. Is that information true and correct?

A. Yes, sir.

Q. Okay. And that's what you did to commit these crimes?

A. Yes, sir.

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THE COURT: All right. The Court finds that the defendant has knowingly, voluntarily and intelligently, with the advice of his attorney, entered a guilty plea to Counts 1, 2 and 3 of the indictment. The Court further finds that the elements required to support a conviction under the statutes charged in Counts 1, 2 and 3 have been satisfied.

The Court further finds that there is a sufficient factual basis to support the defendant's guilty pleas to Counts 1, 2 and 3 of the indictment. The Court further finds that, based on the defendant's answers under oath, that he has received the effective assistance of counsel from his attorney. So therefore, the Court will accept the guilty pleas to Counts 1, 2 and 3 of the indictment.

The Court will also accept the plea agreement that's been filed by the parties in this particular case. The Court will reserve to the defendant the right to appeal the sufficiency of the factual basis presented on Count 2 under the applicable

provisions of Rule 11 of the Federal Rules of Criminal Procedure.

So I have accepted your guilty plea to Counts 1, 2 and 3. I've also accepted the plea agreement, so I'm bound by it, you're bound by it, and the government is bound by it.

* * * * *

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CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: December 12, 2005

/s/

ESTELLA O. CHAMPION, CCR, CRR

[SEAL]

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SIPC

No. 06-571

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SUPREME COURT, U.S.

In the Supreme Court of the United States

MICHAEL A. WATSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether receiving a firearm in exchange for controlled substances constitutes use of the firearm during and in relation to a drug trafficking crime within the meaning of 18 U.S.C. 924(c)(1).

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In the Supreme Court of the United States

No. 06-571

MICHAEL A. WATSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter*, but is reprinted in 191 Fed. Appx. 326.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2006. The petition for a writ of certiorari was filed on October 23, 2006, and was granted on February 26, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 924(c)(1)(A) provides in pertinent part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime * * *,

> uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime

be subject to specified penalties.[1]

The entirety of 18 U.S.C. 924 (2000 & Supp. IV 2004) and the pertinent part of 18 U.S.C. 922 are set forth in the appendix. App., *infra*, 1a-14a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Louisiana, petitioner was convicted of distributing oxycodone hydrochloride, in violation of 21 U.S.C. 841(a)(1); using a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); and unlawfully possessing firearms as a convicted felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 5a. He was sentenced to a total of 262 months of imprisonment. *Id.* at 6a. The court of appeals affirmed. *Id.* at 1a-2a.

1. As stipulated in the plea agreement (Pet. App. 7a-11a), in November 2004, law enforcement agents, assisted by a confidential informant, were investigating petitioner's drug trafficking and firearm activities. *Id.* at 8a-9a. Petitioner previously had been convicted of two state felony offenses for distribution of cocaine. *Id.* at 11a. Petitioner told the informant that he wished to purchase a firearm to protect himself against robbers. *Id.* at 9a. When petitioner asked the informant how much the firearm would cost, the informant replied that he did not know, but that the firearm dealer would be

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[1] Only the "use" provision is directly at issue here. Petitioner was not indicted under the "carry" or "possession" prongs of the statute. J.A. 7-8.

willing to exchange a firearm for drugs. *Ibid.* Petitioner advised the informant that he would be willing to trade drugs for the firearm. *Ibid.*

Subsequently, the informant told petitioner that he had an Israeli Military Industries Desert Eagle pistol available to exchange for drugs. Pet. App. 9a. On the day of the transaction, the informant and an undercover agent met petitioner outside petitioner's residence, and petitioner exchanged twenty-four dosage units of oxycodone hydrochloride, also known as OxyContin, for a Desert Eagle .50 caliber pistol. *Ibid.* After the exchange, law enforcement agents apprehended petitioner and found the Desert Eagle pistol in his vehicle. *Ibid.*

Law enforcement officers found additional firearms and controlled substances in a subsequent search of petitioner's residence. Pet. App. 9a-10a. Among the items found were approximately 18 dosage units of oxycodone (OxyContin), 29 tablets of alprazolam (Xanax), 30 tablets of hydrocodone (Lorcet), and a scale. *Id.* at 9a. They also located two Ruger semi-automatic rifles, a Winchester single-shot rifle, a Winchester single-shotgun, and a Bryco semiautomatic pistol, along with approximately 700 rounds of ammunition of various types. *Id.* at 9a-10a.

Petitioner informed the law enforcement officers that he had prescriptions for the controlled substances, and that he had sold some of his prescribed drugs on a number of occasions to raise cash. Pet. App. 10a. Petitioner admitted to agents that he had two previous state felony cocaine distribution convictions. *Id.* at 10a-11a. He also told the agents that, in addition to the firearms found in the search, he had a Colt .45 caliber semiautomatic pistol and a Glock 9 mm. semiautomatic pistol that had

been stolen from his residence. *Id.* at 10a. He further admitted that he purchased the Desert Eagle semiautomatic pistol "to protect his other firearms and drugs from robbery and theft." *Id.* at 10a-11a.

2. A grand jury in the United States District Court for the Middle District of Louisiana returned a three-count indictment charging petitioner with distributing oxycodone hydrochloride, in violation of 21 U.S.C. 841(a)(1); using a firearm during and in relation to that drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); and unlawfully possessing as a convicted felon the firearms located in his residence, in violation of 18 U.S.C. 922(g)(1). Pet. App. 5a; J.A. 7-9. Petitioner entered a conditional guilty plea based on stipulated facts, retaining his right to challenge the sufficiency of the factual basis underlying his conviction under Section 924(c)(1). Pet. App. 7a-11a; J.A. 18-20. Petitioner was sentenced to a total of 262 months of imprisonment. Pet. App. 6a. His advisory Guidelines range of 262 to 327 months was based on his career offender status and the Section 924(c)(1) conviction, and his sentence included a 60-month consecutive term for the violation of Section 924(c)(1). *Ibid.*; Presentence Investigation Report para. 21; *id.* para. 48 (citing Sentencing Guidelines §§ 2K2.4(c), 4B1.1(c)(2) and (3) (2004)).

3. The court of appeals affirmed. Pet. App. 1a-2a. The court held that petitioner's receiving of a handgun in exchange for drugs constituted use of that firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). Pet. App. 1a-2a. In so doing, the court relied on its decisions in *United States* v. *Zuniga*, 18 F.3d 1254 (5th Cir.), cert. denied, 513 U.S. 880 (1994), and *United States* v. *Ulloa*, 94 F.3d 949 (5th

Cir. 1996), cert. denied, 520 U.S. 1157 (1997). Pet. App. 2a.

In *Zuniga*, the Fifth Circuit upheld the Section 924(c)(1) conviction of a defendant who traded drugs for a firearm. The court of appeals decided *Zuniga* shortly after this Court held in *Smith* v. *United States*, 508 U.S. 223 (1993), in the context of a guns-for-drugs trade, that use of a firearm "as an item of barter or commerce" falls within the plain language of Section 924(c)(1), as long as the use occurs during and in relation to a drug trafficking offense. *Id.* at 237. The Fifth Circuit concluded in *Zuniga* that *Smith* was not "distinguishable on the basis that * * * the defendant owned the drugs and was bartering them for the firearms, while in *Smith* the defendant owned the firearm and was bartering it for the drugs." *Zuniga*, 18 F.3d at 1259. The court reasoned that, in either case, "the presence of the firearms was not incidental, but rather an essential part of the negotiations." *Ibid.*

The Fifth Circuit reaffirmed *Zuniga* after this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995). In *Bailey*, this Court construed "use" in Section 924(c)(1) as "requir[ing] evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Id.* at 143. In *Ulloa*, the Fifth Circuit held that, "by bartering drugs for firearms, [the defendant] 'used' the firearms because, under one of *Bailey*'s definitions of 'use', [the defendant] 'carr[ied] out a purpose or action by means of' them." *Ulloa*, 94 F.3d at 956 (quoting *Bailey*, 516 U.S. at 145) (last bracket in original; internal citations omitted). The *Ulloa* court reasoned that, by requiring that "he be furnished firearms in exchange for his drugs," a defendant "ac-

tively employ[s]" the firearms and thus "use[s]" them within the meaning of Section 924(c)(1). *Ibid.*

Here, the court of appeals rejected petitioner's attempt to distinguish *Zuniga* and *Ulloa*. The court concluded that the factors cited by petitioner—that government agents first proposed trading drugs for the handgun, that petitioner controlled the handgun for only moments before his arrest, and that he could not have used the handgun because it was unloaded—were not material to the determination of "use" under Section 924(c)(1). Pet. App. 2a.

SUMMARY OF ARGUMENT

An individual who receives a firearm in exchange for drugs uses the firearm during and in relation to a drug trafficking crime within the meaning of 18 U.S.C. 924(c)(1). That conclusion follows directly from the text, structure, and purpose of the statute.

A. The plain language of the "use" prong of Section 924(c)(1), as construed by this Court, encompasses the conduct at issue here.

In *Smith* v. *United States*, 508 U.S. 223 (1993), this Court held that "use" in Section 924(c)(1) encompasses not only use of a firearm as a weapon, but also use of a firearm as an item of barter or commerce. The Court based that conclusion on the ordinary meaning of the word "use," as well as the structure and purpose of Section 924. The Court reaffirmed *Smith* in *Bailey* v. *United States*, 516 U.S. 137 (1995). In that case, the Court held that "use" in Section 924(c)(1) requires that the defendant actively employ the firearm, such that he make the firearm an operative factor in relation to the drug trafficking crime. The *Bailey* Court made clear

that its active-employment understanding of use encompasses bartering.

Under the plain text of Section 924(c)(1), as construed in *Bailey* and *Smith*, an individual who trades illegal drugs for a firearm uses that firearm during and in relation to a drug trafficking crime. First, by accepting the firearm as consideration to effectuate his drug sale, the drug dealer "uses" the firearm in precisely the same manner as the defendant in *Smith*: as an item of barter or commerce. Second, in so doing, the drug dealer actively employs the firearm during and in relation to a drug trafficking crime. In a drugs-for-guns barter, there is nothing passive about the drug dealer's receipt of the firearm. It is the sine qua non of the transaction. The dealer uses the firearm as a means to carry out a purpose or action, namely, to seal his drug deal.

B. The conclusion that "use" in Section 924(c)(1) encompasses receipt of a firearm as an item of commerce is compelled by the meaning of "use" in the integrally related forfeiture provision in 18 U.S.C. 924(d). As this Court held in *Smith*, and reiterated in *Bailey*, "use" must have the same meaning in Section 924(c)(1) as it does in Section 924(d). Section 924(d) provides for the forfeiture of firearms "intended to be used" in various offenses, including ones in which the firearm is received as an item of barter or commerce. Significantly, this Court relied on these same provisions in *Smith* to conclude that "use" in Section 924(d), and therefore "use" in Section 924(c)(1), encompasses use of a firearm as an item of barter or commerce. Section 924(d) thus makes clear that Congress contemplated that a firearm can be "used" when it is received as an item of commerce.

C. The purpose of the statute confirms that petitioner's conduct amounts to "use" in violation of the statute. Petitioner, a convicted drug dealer, initiated the request for a firearm, and then agreed to provide drugs to obtain it. By contributing to the introduction of the firearm into the transaction, petitioner caused the very harm that Congress sought to avoid in enacting Section 924(c)(1). Regardless of which side of the guns-for-drugs barter a defendant is on, the firearm's presence—and its integral role in the illegal drug deal—causes the risk to society that Congress sought to prevent.

D. The rule of lenity has no application here. That rule comes into play only when, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted). There is no need to make such a guess here. A drug dealer who takes a firearm in order to close a drug deal—no less than one who offers the firearm—uses the firearm during and in relation to a drug trafficking crime under the plain text of Section 924(c)(1), as construed by this Court in *Smith* and *Bailey*.

ARGUMENT

RECEIVING A FIREARM IN EXCHANGE FOR CONTROLLED SUBSTANCES CONSTITUTES USE OF THE FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME WITHIN THE MEANING OF 18 U.S.C. 924(c)(1)

A. The Text Of Section 924(c)(1) Encompasses Receiving A Firearm To Close A Drug Deal

An individual who accepts a firearm as the consideration for the sale of his drugs uses the firearm as an item of barter or commerce. Moreover, that person actively employs the firearm during and in relation to a drug trafficking crime by taking the firearm as a necessary part of closing his drug deal. Accordingly, receiving a gun in exchange for controlled substances falls squarely within the text of Section 924(c)(1) as construed by this Court in *Smith* v. *United States*, 508 U.S. 223 (1993), and *Bailey* v. *United States*, 516 U.S. 137 (1995).

1. In *Smith*, the Court held that a defendant who trades his firearm for drugs uses it during and in relation to a drug trafficking offense within the plain language of Section 924(c)(1). The Court rejected the view that the scope of the provision was limited to using a firearm "*as a weapon*," recognizing that Section 924(c)(1)'s language "sweeps broadly." 508 U.S. at 229. The Court observed that the ordinary meaning of the verb "use" includes "[t]o convert to one's service," "to employ," "to avail oneself of," and "to carry out a purpose or action by means of." *Ibid.* (quoting *Webster's New International Dictionary* 2806 (2d ed. 1939); *Black's Law Dictionary* 1541 (6th ed. 1990)); accord *Bailey*, 516 U.S. at 145. Based on that common under-

standing of "use," as well as the structure of Section 924(c)(1), the Court concluded that "Congress employed the term 'use' expansively, covering both use as a weapon * * * and use as an item of trade or barter." *Smith*, 508 U.S. at 236.

In so doing, the Court looked to the meaning of "use" in Section 924(d). *Smith*, 508 U.S. at 235. The Court noted (*id.* at 234) that under Section 924(d)(1), any firearm or ammunition "intended to be used" in various offenses referenced in Section 924(d)(3) is subject to seizure and forfeiture. See 18 U.S.C. 924(d)(1) and (3). Because those offenses include offenses in which the firearm is used "as an item of barter or commerce," not just offenses where it is used as an offensive weapon, the Court held that the meaning of "use" in Section 924(c)(1) must also encompass use of a firearm as an item of barter or commerce. *Smith*, 508 U.S. at 234.

The Court further concluded that "[t]he phrase 'in relation to' is expansive." *Smith*, 508 U.S. at 237. Although the Court did not determine "the precise contours" of that requirement, it held that the gun bartered in *Smith* met "any reasonable construction of it." *Id.* at 238. The Court reasoned that the bartered gun did far more than merely facilitate the drug trafficking crime; rather, "the gun . . . was an integral part of the transaction." *Ibid.* (quoting *United States* v. *Phelps*, 895 F.2d 1281, 1283 (9th Cir. 1990) (Kozinski, J., dissenting from denial of rehearing en banc)). As the Court explained, "[w]ithout it, the deal would not have been possible." *Ibid.*

The Court further explained that its construction of Section 924(c)(1)'s "use" prohibition was consistent with Congress's purpose, noting that Congress "was no doubt aware that drugs and guns are a dangerous combina-

tion." *Smith*, 508 U.S. at 240. The Court "[saw] no reason why Congress would have intended courts and juries applying § 924(c)(1) to draw a fine metaphysical distinction between a gun's role in a drug offense as a weapon and its role as an item of barter; it creates a grave possibility of violence and death in either capacity." *Ibid.* Accordingly, the Court concluded that use of a firearm "as an item of barter fall[s] within the plain language of § 924(c)(1), so long as the use occurs during and in relation to a drug trafficking offense." *Ibid.*

The Court reaffirmed *Smith* in *Bailey, supra.* *Bailey* held that "use" of a firearm in Section 924(c)(1) means "an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." 516 U.S. at 143. Referring to the dictionary definitions consulted in *Smith*, the Court observed that these various definitions "imply action and implementation." *Id.* at 145. The Court thus rejected a "proximity and accessibility standard" for evaluating whether a firearm had been "use[d]" within the meaning of Section 924(c)(1), because, in the Court's view, "nearly every possession of a firearm by a person engaged in drug trafficking would satisfy the standard." *Id.* at 144. Applying its "active employment" standard, the Court concluded that the evidence in the consolidated cases in *Bailey*—one involving "a firearm inside a bag in [a] locked car trunk," and the other involving an "unloaded, holstered firearm * * * locked in a footlocker in a bedroom closet"—was insufficient. *Id.* at 151.

In so holding, the *Bailey* Court made clear that its decision was "not inconsistent with *Smith*." *Bailey*, 516 U.S. at 148. The Court observed that "use" encompasses "use as an item of barter," and that the "active-

employment understanding of 'use' certainly includes," *inter alia*, "bartering." *Ibid.* When a firearm is used as an item of barter it does not sit on the sidelines, but plays an active role in the trafficking. Likewise, the use of a firearm in bartering is obviously distinct from simple possession.

2. Under the plain text of Section 924(c)(1), as construed in *Smith* and *Bailey*, petitioner used a firearm during and in relation to a drug trafficking crime. First, a drug dealer who accepts a firearm as consideration for his drugs uses the firearm in the very manner recognized as a "use" by *Smith*: "as an item of barter or commerce." *Smith*, 508 U.S. at 237. The fact that *Smith* involved a defendant trading a gun for drugs, and not vice versa, is "a distinction without a difference." *United States* v. *Cannon*, 88 F.3d 1495, 1509 (8th Cir. 1996). The holding in *Smith* was not that using a firearm to obtain drugs is "use" within the meaning of Section 924(c)(1). The holding was a broader one: that using a firearm as an item of trade or commerce in a drug transaction falls within the plain meaning of the text of the statute. *Smith*, 508 U.S. at 237; accord *Bailey*, 516 U.S. at 148 (observing that the question in *Smith* was whether a "particular use (bartering) came within the meaning of § 924(c)(1)"). Just like the defendant in *Smith*, a drug dealer who takes a firearm in exchange for drugs uses the firearm as an item of commerce in the illegal marketplace. After *Smith*, there can be no doubt that such a "use" is captured by the statute.

Second, a drug dealer who takes a firearm in order to close a drug deal actively employs that firearm as required by *Bailey*. Petitioner contends that his conduct was "[s]imple receipt" of a gun, which he describes as a "quintessentially passive event" in which he "[did]

nothing more than take possession of an object." Br. 9; *id.* at 10-11 (describing his conduct as "mere receipt" of a firearm). But that characterization—which likens petitioner's role to that of a donation box receiving a contribution—ignores the fundamental nature of bartering. As the First Circuit has explained, just because petitioner "received guns does not mean he was passive with respect to them." *United States* v. *Cotto*, 456 F.3d 25, 29 (1st Cir. 2006), petition for cert. pending, No. 06-8168 (filed Dec. 5, 2006). The drug dealer's taking of a firearm in exchange for illegal drugs is not a passive event that happens after the transaction is completed; it *is* the transaction. Taking the gun is part and parcel of an agreed-to exchange—an active act of using the firearm as an item of commerce.

That use fits squarely within the ordinary definitions of "use" relied on by *Bailey* and *Smith*. See *Bailey*, 516 U.S. at 145 (quoting *Smith*, 508 U.S. at 229). The drug dealer uses the firearm as a means to "carry out a purpose or action," namely, to close his drug deal. See *United States* v. *Ulloa*, 94 F.3d 949, 956 (5th Cir. 1996) ("[B]y bartering drugs for firearms, [the defendant] 'used' the firearms because, under one of *Bailey*'s definitions of 'use', [the defendant] 'carr[ied] out a purpose or action by means of' them.") (last set of brackets in original), cert. denied, 520 U.S. 1157 (1997). If the owner of the gun does not proffer the firearm, or if the drug dealer does not take it in exchange for a particular amount of drugs, the illegal drug transaction would not occur. Just as in *Smith*, "[w]ithout it, the deal would not [be] possible." 508 U.S. at 238.[2]

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[2] Cf. *United States* v. *Frederick*, 406 F.3d 754, 764 (6th Cir. 2005) (stating, in a possession-in-furtherance case, that "a defendant's willing-

Under *Bailey*, a defendant who "makes the firearm an operative factor in relation to the predicate offense" satisfies the "active employment" understanding of use. 516 U.S. at 143. Petitioner disputes (Br. 35-39) that *his conduct* with respect to the firearm (as opposed to that of those offering the gun) made it an operative factor. But in such a drugs-for-guns trade, both sides actively employ the firearm. When a drug dealer "accept[s] the gun[] as a way of 'clos[ing] the drug transaction," he "mak[es] the gun an operative factor in the drug trafficking crime." *Cotto*, 456 F.3d at 29 (last two pairs of brackets in original) (quoting *United States* v. *Cox*, 324 F.3d 77, 84 (2d Cir.), cert. denied, 540 U.S. 854, and 540 U.S. 859 (2003)). That conduct is at least as active, with respect to the underlying drug transaction, as displaying a firearm during such a transaction (which petitioner concedes falls within the text of the statute, see Br. 35-36).

Indeed, in *Bailey*, the Court indicated that an offender's mere reference to a firearm in his possession could amount to "active employment," if the reference were "calculated to bring about a change in the circumstances of the predicate offense." *Bailey*, 516 U.S. at 148. Here, the firearm did not merely bring about a change in the circumstances of petitioner's drug distribution; it was an integral part of the drug offense. That is a far cry from the "mere possession" of locked-away weapons that the Court found insufficiently active in

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ness to accept possession of a gun as consideration for some drugs he wishes to sell *does* 'promote or facilitate' that illegal sale," and that "[i]f the defendant did not accept possession of the gun, and instead insisted on being paid fully in cash for his drugs, some drug sales—and therefore some drug trafficking crimes—would not take place"); accord *United States* v. *Luke-Sanchez*, 483 F.3d 703, 706 (10th Cir. 2007).

Bailey. See *id.* at 143. Nor does applying Section 924(c)(1) in the circumstances here improperly stretch the statute to "cover a firearm that played no detectable role in the crime's commission." See *id.* at 147.[3]

Contrary to petitioner's contention (Br. 30-35), *Bailey* did not suggest, in reaffirming *Smith*, that the defendant must be the one offering up or bartering "with" the firearm to satisfy *Bailey*'s "active employment" requirement. To the contrary, *Bailey* expressly stated that "[t]he active-employment understanding of 'use' certainly includes brandishing, displaying, *bartering*, striking with, and, most obviously, firing or attempting to fire a firearm." 516 U.S. at 148 (emphasis added). Notably, in contrast to "striking with," *Bailey* did not limit "bartering * * * a firearm" to "bartering with." But even assuming that the *Bailey* Court had in mind only bartering with a firearm, it is not clear that that phrase is limited to the offeror and, in any event, a defendant who takes a firearm in exchange for illegal drugs actively employs the firearm in the relevant sense.

That conclusion is made even more clear by considering the remainder of the "use" prohibition in Section 924(c)(1). As this Court has repeatedly explained, it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United*

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[3] Nor does this Court's decision in *Jones* v. *United States*, 529 U.S. 848 (2000), which held that a private residence is not a building "used in" interstate commerce, advance petitioner's cause. See Br. 18. Unlike a person who trades drugs in exchange for a gun, a building cannot be an active participant in a transaction, and, in any event, *Jones* did not involve an effort to exchange a private home as part of the relevant transaction.

States, 508 U.S. 129, 131-132 (1993); *Smith*, 508 U.S. at 229. Here, the question is not whether taking a firearm in exchange for drugs is use of the firearm in the abstract, but whether it involves the use of a firearm "during and in relation to any * * * drug trafficking crime." 18 U.S.C. 924(c)(1). And where, as here, someone accepts a firearm to close a drug deal, that person clearly has used the firearm during and in relation to a drug trafficking crime in the ordinary sense of those words.

For the same reason, the hypothetical examples on which petitioner relies miss the mark. See Br. 11-12 (citing *United States* v. *Westmoreland*, 122 F.3d 431, 435-436 (7th Cir. 1997); *United States* v. *Stewart*, 246 F.3d 728, 730-731 (D.C. Cir. 2001)). While it may not be natural for a customer who pays a cashier a dollar for a cup of coffee in the courthouse cafeteria to say that he has thereby "used the coffee," that hypothetical strips the question of "use" out of the context contained in the statute. Section 924(c)(1) asks whether the use occurs "during and in relation to * * * [a] drug trafficking crime." One does not usually discuss whether one has used a cup of coffee as an item of commerce during and in relation to a beverage transaction. But, if one did, it would be clear that one uses the coffee in, and as integral to, the beverage transaction. Here, the moment the recipient takes possession of the firearm in exchange for the drugs, he uses it to complete the drug trafficking crime. In addition, both of petitioner's hypotheticals are exchanges involving money—the universal medium of exchange—rather than a true barter. They therefore do not capture the give-and-take character of any bartering transaction, in which each bartered item is central to the

transaction, with each party to the exchange using both bartered items as a way to close the transaction.

B. The Meaning Of "Use" In Section 924(d) Confirms That Receiving A Firearm In Exchange For Illegal Drugs Is Proscribed By The "Use" Prong In Section 924(c)(1)

Based on the well-established principle that neither a single word nor a single provision of a statute can be read in isolation, *Smith*, 508 U.S. at 233, this Court concluded in both *Bailey* and *Smith* that "'using a firearm' should not have a 'different meaning in § 924(c)(1) than it does in § 924(d).'" *Bailey*, 516 U.S. at 146 (quoting *Smith*, 508 U.S. at 235). Because "use" of a firearm in Section 924(d) encompasses "receipt" of a firearm as an item of commerce, "use" in Section 924(c) must be so construed as well.

1. In *Smith*, the Court concluded that, because provisions in Section 924(d)(1) and (d)(3) require the forfeiture of firearms "intended to be used" in various offenses, and those offenses include ones where the firearm is used as an item of barter or commerce, "use" in Section 924(c) must also encompass use of a firearm as an item of barter or commerce. 508 U.S. at 234. Significantly, the *Smith* Court's examples from Section 924(d) include offenses where the use of the firearm as an item of commerce is *receipt* of a firearm.[4] These provisions

[4] Those offenses include "unlicensed receipt of a weapon from outside the State," in violation of 18 U.S.C. 922(a)(3); "receipt of stolen firearms," in violation of 18 U.S.C. 922(j); and "shipment or receipt of a firearm with intent to commit a felony," in violation of 18 U.S.C. 924(b). *Smith*, 508 U.S. at 234 & n.*. In addition, as the First Circuit has observed, Section 924(d)(3) references several other offenses consisting of receipt of a firearm as an item of commerce, including "those described in 18 U.S.C. § 922(a)(1)(A) (unlicensed importing, dealing in, or receiving firearms), * * * § 922(*l*) (importation of firearms or re-

make clear that, "under § 924(d), a gun can be 'used' in an offense consisting of receipt of the gun," because any firearm that is "intended to be used" to violate these receipt offenses is subject to forfeiture. *Cotto*, 456 F.3d at 29. Thus, for example, Section 924(d) contemplates that "one 'uses' a firearm under § 924(d)(1) when one 'receives' a firearm in violation of § 922(a)(3)," which prohibits the unlicensed receipt of a weapon from out-of-state. *Cannon*, 88 F.3d at 1509.

The word "use" must be given the same meaning in Section 924(c)(1). See *Bailey*, 516 U.S. at 146; *Smith*, 508 U.S. at 235. In each of the examples from Section 924(d)(3) above, the intended "use" that subjects the firearm to forfeiture is no different in character from the "use" at issue here. By receiving the firearm in a barter for drugs, petitioner used the firearm every bit as much as a defendant who receives an unlicensed firearm from out-of-state.

2. Despite the text of Section 924(d)(1) and (d)(3), petitioner contends (Br. 24-25) that "use" in Section 924(c) does not sweep as broadly. He notes (*id.* at 25) that Section 924(d)(1) calls for forfeiture of firearms and ammunition "intended to be used" in the offenses referenced in Section 924(d)(3), rather than "used" in such offenses as required by Section 924(c)(1). Although the Court recognized that distinction in *Bailey*, the distinction has no force in this context. In *Bailey*, the Court distinguished between current uses and prospective uses, noting that the language of Section 924(d) "provided for forfeiture of a weapon even before it had been 'used.'" In that respect, the *Bailey* Court concluded

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ceipt of imported firearms), [and] § 922(n) (receipt of firearm by person under indictment)." *Cotto*, 456 F.3d at 29 n.4.

that Section 924(d) swept more broadly than Section 924(c), which proscribed only "actual use." *Bailey*, 516 U.S. at 146.

But there is no dispute here that petitioner actually received the firearm; the question is whether the meaning of "use" of a firearm in Section 924(c)(1) is broad enough to encompass "receipt" of a firearm during a bartering transaction. Section 924(d)(1) and (d)(3) confirm that it is. By calling for forfeiture of a firearm that is "intended to be used" in specific offenses—including certain receipt offenses—Congress plainly understood that the firearm could at some point be "used" in such an offense simply by being received as an item of commerce. The fact that for purposes of Section 924(d) the "use" need not have yet occurred does not detract from the conclusion that Section 924(d) makes clear that receipt is a qualifying use. And the fact that such "receipt" of a firearm falls within the meaning of "use" in Section 924(d) compels the conclusion that "receipt" as an item of barter or commerce also falls within the meaning of "use" in Section 924(c)(1). That was the logic of the Court's conclusion in *Smith*, see 508 U.S. at 234-235, and that logic is equally forceful here.

In addition, petitioner relies (Br. 23-24) on the fact that Section 924(d)(1) also provides for forfeiture of firearms "involved in or used in" a broad range of offenses and violations. 18 U.S.C. 924(d)(1). But petitioner is wrong to suggest that because that particular phrase captures more than use of a firearm, "use" in Section 924(d) does not encompass receipt of a firearm as an item of commerce. The important point here is that, with respect to the receipt offenses in Section 924(d)(3), Congress called for forfeiture of the firearms in narrower circumstances, namely, where they were "in-

tended to be used" in those offenses. See 18 U.S.C. 924(d)(1) (subjecting to seizure or forfeiture "any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection"). In so doing, Congress demonstrated its view that one uses a firearm by receiving it as an item of barter or commerce and that it did not need to employ the broader "involved in" language in order to capture such conduct.[5]

3. Nor does the fact that some provisions in the United States Code employ the term "receive" (see Pet. Br. 19-22) to criminalize certain firearm-related conduct undermine the conclusion that "use" in Section 924(c)(1) encompasses receipt of a firearm in a drugs-for-guns trade. The most relevant provision for interpreting the meaning of "use" in Section 924(c) is Section 924(d). "A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning," *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2417 (2007), and "[t]hat rule must surely apply, *a fortiori*, to use of identical words *in the same section of the same enactment*." *Dewsnup* v. *Timm*, 502 U.S. 410, 422 (1992) (Scalia, J., dissenting). Although these principles are not "irrebuttable," *Environmental Def.* v. *Duke Energy Corp.*, 127 S. Ct. 1423, 1432 (2007), there is no need

[5] It is true that several of the receipt offenses listed in Section 924(d)(3) also are swept in by other provisions of Section 924(d) to which the "involved in or used in" language applies. See, *e.g.*, 18 U.S.C. 924(d)(1) (listing Section 922(j) as one such offense). But the fact that Congress has overlapping forfeiture provisions with respect to certain (but not all) of the receipt offenses takes nothing away from the fact that, in the text referring to the Section 924(d)(3) offenses, Congress saw no need to "expand the language for offenses in which firearms were 'intended to be used,'" even though receipt of a firearm constituted the offense. See *Smith*, 508 U.S. at 235.

to resort to general principles here, because this Court already has held that "use" in Section 924(c) has the same meaning as "use" in Section 924(d). See *Bailey*, 516 U.S. at 507; *Smith*, 508 U.S. at 235. Given that "use" as employed by Congress in Section 924 encompasses "receipt" of a firearm as an item of commerce, it was not necessary for Congress to employ the term "receive" in Section 924(c)(1) in order to reach petitioner's bartering conduct. Indeed, more than half of the firearm-receipt provisions to which petitioner points are ones referenced in Section 924(d)(3), which (as discussed above) are encompassed by Congress's understanding of "use" in Section 924(d). Compare Pet. Br. 20 (citing 18 U.S.C. 922(a)(1), 922(a)(3), 922(*l*), 922(n), and 924(b)), with 18 U.S.C. 924(d)(3)(C) and (E) (referencing, *inter alia*, those provisions). That fact makes clear that the term use in Section 924 *includes*, rather than excludes or distinguishes, receipt.

Moreover, the fact that Congress has employed both "use" and "receive" in the disjunctive in various other statutory provisions does not mean that the word "use" in Section 924(c)(1) excludes taking a firearm in exchange for illegal drugs. See Pet. Br. 20-21 (citing statutes criminalizing, *inter alia*, receipt or use of the virus that causes smallpox). Even assuming that "use" in those other statutes is mutually exclusive of "receipt," this Court has recognized that where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, "the meaning [of the same words] well may vary to meet the purposes of the law." *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001). In all events, Section 924(d)'s treatment of "receipt" as a

type of use makes clear how those two terms interrelate in the relevant context.

C. Construing The Statute To Proscribe Receiving A Firearm In Exchange For Drugs Is Consistent With The Fundamental Purpose Of The Statute

Consideration of Congress's purpose in enacting Section 924(c)(1) confirms that the statute punishes the act of taking a firearm in exchange for illegal drugs.

1. This Court has described "the statute's basic purpose broadly, as an effort to combat the 'dangerous combination' of 'drugs and guns.'" *Muscarello* v. *United States*, 524 U.S. 125, 132 (1998) (quoting *Smith*, 508 U.S. at 240). Proscribing the barter of drugs for guns fits well within the core purpose of the statute. As the *Smith* Court observed, "[t]he fact that a gun is treated momentarily as an item of commerce does not render it inert or deprive it of destructive capacity. Rather, as experience demonstrates, it can be converted instantaneously from currency to cannon." *Smith*, 508 U.S. at 240. "That is so whether the defendant transfers or receives the gun." *Cotto*, 456 F.3d at 29.

By introducing the firearm into the transaction, petitioner caused the very harm that Congress sought to avoid in enacting Section 924(c)(1). It was petitioner, a convicted drug dealer, who initiated the request for a firearm. Pet. App. 9a. He then agreed to provide the required drugs for the purchase of that firearm. *Ibid.* As this Court observed in *Smith*, "[w]hether guns are used as the medium of exchange for drugs sold illegally or as a means to protect the transaction or dealers, their introduction into the scene of drug transactions dramatically heightens the danger to society." 508 U.S.

at 239 (quoting *United States* v. *Harris*, 959 F.3d 246, 262 (D.C. Cir. 1992)).

Petitioner suggests that the danger to society perceived by *Smith* was only that the particular individual "who brought the weapon with him[] for use as 'currency'" might convert it to use as a weapon, Pet. Br. 4, and that any such danger is "almost entirely absent" when an individual comes to a drug transaction to trade for a gun, *id.* at 15. That suggestion is unfounded. The *Smith* Court saw no reason why Congress would have intended courts and juries applying Section 924(c) "to draw a fine metaphysical distinction between a gun's role in a drug offense as a weapon and its role as an item of barter; it creates a grave possibility of violence and death in either capacity." *Smith*, 508 U.S. at 240. There is likewise no reason to suppose Congress would have "intended to draw [an even finer] distinction between bartering with a firearm and bartering for a firearm." *Cotto*, 456 F.3d at 30. The danger to society is created not only by the person who brings the firearm to the drug transaction, but also by the drug dealer who takes the weapon in exchange for his drugs during the transaction. "An armed drug dealer is far more dangerous than one who is unarmed," *Phelps*, 895 F.2d at 1286 (Kozinski, J., dissenting from denial of rehearing en banc), and "[t]here are any number of not implausible scenarios where the [gun] could have been used to injure or kill somebody," *id.* at 1288.

Petitioner similarly errs in contending (Br. 24-25) that the statute's purpose is not implicated by his conduct because the statute was intended to "persuade the man who is tempted to commit a Federal felony to leave his gun at home." 114 Cong. Rec. 22,231 (1968) (statement of Rep. Poff). "From the perspective of any such

purpose (persuading a criminal 'to leave his gun at home')," it would make no sense for Congress to penalize one who brings a gun to trade for drugs but ignores the drug dealer who takes a gun from that person as an integral part of his drug deal. See *Muscarello*, 524 U.S. at 132-133. That is particularly true where the drug dealer, as here, affirmatively sought the firearm.

Moreover, contrary to petitioner's suggestion (Br. 15), the meaning of the statute does not turn on whether any particular defendant's arrest for violating Section 924(c)(1) results from a government undercover operation, or whether a firearm involved in a bartering transaction may be unloaded. Both *Smith* and *Bailey* make clear that a gun need not be discharged to be used, and use of a firearm as an item of barter does not require that a firearm be loaded. In any event, the recipient of an unloaded firearm could load it during the transaction in which it is received. It is the presence of the firearm at the drug transaction that constitutes a danger. The display of a firearm, whether loaded or unloaded, can instill fear in others and "creates an immediate danger that a violent response will ensue." *McLaughlin* v. *United States*, 476 U.S. 16, 17-18 (1986) (holding that an unloaded firearm is a "dangerous weapon" within the meaning of the federal bank robbery statute, 18 U.S.C. 2113(d)). Given the dangerous nature of guns generally, "the law reasonably may presume that such an article is *always* dangerous even though it may not be armed at a particular time or place." *Id.* at 17 (emphasis added).

Nor should the meaning of Section 924(c)(1) be "modified to forbid entrapment-like behavior that falls outside the bounds of current entrapment law." *United States* v. *Jimenez Recio*, 537 U.S. 270, 276 (2003). See Br. 15, 42. If a Section 924(c)(1) prosecution results

from a sting operation, a defendant may be able to raise an entrapment defense—if there was both government inducement and a lack of predisposition on his part to commit the offense. See *Jacobson* v. *United States*, 503 U.S. 540, 548-549 (1992); *Sorrells* v. *United States*, 287 U.S. 435, 442-445 (1932). But the statute should not be distorted to give all defendants—including those not caught in a sting—greater protection. And petitioner, who pleaded guilty, could not reasonably have advanced any entrapment issues here, given his affirmative request for the firearm and his admitted ongoing illegal sales of controlled substances. See Pet. App. 9a-11a.[6]

2. Petitioner suggests (Br. 22-23) that upholding his conviction would "contravene the import" of the 1998 amendment to Section 924(c)(1). In that amendment,

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[6] Indeed, the law would generally permit a defendant who receives a firearm in trade to be held liable for the introduction of a dangerous weapon into the transaction by his trading partner. Although the government did not seek to impose liability on petitioner under an aiding and abetting theory, the government generally could (at least where the individual who supplies the drugs is not a government agent) "charge the party receiving the gun with aiding and abetting the party supplying it." *Westmoreland*, 122 F.3d at 436 n.1. See *United States* v. *Price*, 76 F.3d 526, 529 (3d Cir. 1996) (explaining that aiding and abetting liability under 18 U.S.C. 2 applies to a charge of using or carrying a firearm under Section 924(c)) (collecting cases); *United States* v. *Long*, 905 F.2d 1572, 1576-1577 n.8 (D.C. Cir.) (Thomas, J.) (observing that, "where the government proves that a defendant has aided or abetted another person's 'use' of a firearm, the defendant may be punished as a principal regardless of whether the defendant himself has actually or constructively possessed the firearm"), cert. denied, 498 U.S. 948 (1990); see also *United States* v. *Hornaday*, 392 F.3d 1306, 1311-1314 (11th Cir. 2004) (discussing possible liability for aiding and abetting under 18 U.S.C. 2 for causing a government agent to do an act that would have been criminal if performed by the defendant), cert. denied, 545 U.S. 1134 (2005).

Congress extended the reach of Section 924(c)(1) to prohibit not only the use or carrying of a firearm during and in relation to a drug trafficking crime, but also the possession of a firearm "in furtherance of any * * * drug trafficking crime." See Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469. Even if that amendment were entitled to any weight in interpreting earlier-enacted portions of Section 924(c)(1) (but see, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186-188 (1994)), nothing about the amendment is inconsistent with construing "use[]" of a firearm "during and in relation to any * * * drug trafficking crime" to encompass petitioner's conduct.

The 1998 amendment responded to this Court's decision in *Bailey*, which construed the "use" provision in Section 924(c)(1) to require "active employment" of a firearm. The purpose of the amendment was to "revers[e] the restrictive effect of the *Bailey* decision," by proscribing possession of a firearm that, while not sufficiently active to fall within *Bailey*'s definition of "use," nevertheless furthered a drug trafficking crime. H.R. Rep. No. 344, 105th Cong., 1st Sess. 6 (1997). The amendment is an alternative means by which a defendant can violate Section 924(c)(1), under which the government does not have to establish proof of "use[]." Congress based the amendment on the understanding that "[t]he word 'possession' has a broader meaning than either 'uses' or 'carries.'" *Ibid.*; 144 Cong. Rec. 26,608 (1998) (statement of Sen. DeWine) (observing that *Bailey* "severely restricted" Section 924(c) prosecutions and that the amendment was an effort to "restore this crime fighting tool").

Although a drug dealer who takes a firearm in exchange for his drugs generally will be subject to prosecution and punishment under the 1998 amendment, that amendment does not suggest that Congress believed such conduct otherwise escaped punishment under the statute. The 1998 amendment applies to a wide variety of fact patterns other than receipt of a weapon in trade, and the legislative history of the amendment indicates Congress was principally concerned with guns possessed in circumstances akin to those presented in *Bailey*. See, *e.g.*, 144 Cong. Rec. at 26,608-26,609 (statement of Sen. DeWine) (noting that the amendment is "meant to embrace" the situation "where a defendant kept a firearm available to provide security for the transaction, its fruit or proceeds, or was otherwise emboldened by its presence in the commission of the offense"). Moreover, nothing in the legislative history of the 1998 amendment reflects any specific congressional attention to Section 924(c)(1) offenses involving the bartering of a firearm.

To the contrary, Congress had no need to address bartering. Congress sought to overturn the result in *Bailey*, not *Smith*. *Smith* had construed the "use" provision of Section 924(c)(1) to encompass use of a firearm as an item of barter or commerce, and *Bailey* had reaffirmed that holding. *Bailey*, 516 U.S. at 148 ("our decision today is not inconsistent with *Smith*"). And, as of the time of the 1998 amendment, the majority of lower courts to reach the question had held that it did not matter which side of the bartering transaction the defendant was on: taking a firearm in exchange for drugs constituted "use" of the firearm during and in relation to a drug trafficking crime within the meaning of Section 924(c)(1). See *United States* v. *Ramirez-Rangel*, 103 F.3d 1501, 1506 (9th Cir. 1997); *Ulloa*, 94 F.3d at 955-956

(5th Cir.); *Cannon*, 88 F.3d at 1508-1509 (8th Cir.); *United States* v. *Harris*, 39 F.3d 1262, 1269 (4th Cir. 1994); *Harris*, 959 F.2d at 261-262 (D.C. Cir.), abrogated by *Stewart*, 246 F.3d at 730-732; compare *United States* v. *Woodruff*, 131 F.3d 1238, 1243 (7th Cir.) (concluding that exchanging drugs for a gun violates Section 924(c)(1)'s "use" prohibition), cert. denied, 524 U.S. 956 (1998), with *Westmoreland*, 122 F.3d at 435 (7th Cir.) (concluding that receipt of a gun from a government agent in payment for drugs does not constitute "use" under Section 924(c)(1)).

It is appropriate to presume that Congress was aware of these interpretations of Section 924(c)(1), see, *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-698 (1979), and the 1998 amendment is entirely consistent with these decisions. Moreover, the extension of Section 924(c)(1) to include possession would even more clearly provide an alternative basis for prosecuting when the defendant offers the gun in exchange for drugs as in *Smith*. But even petitioner does not suggest that the amendment overturned the result in *Smith*.

D. Because The Ordinary Tools Of Statutory Construction Make The Meaning Of Section 924(c)(1) Clear, The Rule Of Lenity Has No Application In This Case

Contrary to petitioner's argument (Br. 39-40), the rule of lenity does not apply here. The rule of lenity is "reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute." *Smith*, 508 U.S. at 239 (quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971)) (internal quotation marks omitted). "The simple existence of some statutory ambiguity * * * is not sufficient to warrant application of that rule, for most statutes are

ambiguous to some degree." *Muscarello*, 524 U.S. at 138. As the Court explained in *Moskal* v. *United States*, 498 U.S. 103, 108 (1990), "[b]ecause the meaning of language is inherently contextual, [the Court has] declined to deem a statute 'ambiguous' for purposes of lenity merely because it was possible to articulate a construction more narrow than that urged by the government." Instead, the rule of lenity comes into play only when there is a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Muscarello*, 524 U.S. at 138-139 (internal quotation marks and citations omitted).

There is no such grievous ambiguity here. The text of Section 924(c)(1), the language of related provisions in Section 924(d), and the fundamental purpose of the statute all compel the conclusion that an individual, like petitioner, who takes a firearm in order to close an illegal drug deal uses that firearm during and in relation to a drug trafficking crime.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 922 of Title 18 of the United States Code provides in pertinent part:

Unlawful acts

(a) It shall be unlawful—

(1) for any person—

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

* * * * *

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State,

(B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

* * * * *

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

* * * * *

(*l*) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

* * * * *

(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

2. Section 924 of Title 18 of the United States Code (2000 & Supp. IV 2004) provides:

Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the

provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of

the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: Provided, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et

seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same sub-

ject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(*l*) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(*o*) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(8)

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In the Supreme Court of the United States

MICHAEL A. WATSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONER

I. THE ORDINARY OR NATURAL MEANING OF "USE" DOES NOT ENCOMPASS MERE RECEIPT

A. Respondent Concedes That Its Reading Is Not Natural, And Its Bid To Bury That Meaning In "Context" Is Baseless

In *Smith* v. *United States*, 508 U.S 223, 228 (1993), and again in *Bailey* v. *United States*, 516 U.S. 137, 145 (1995), this Court held that the term "use" in 18 U.S.C. § 924(c)(1) must be given its "ordinary or natural meaning." Respondent candidly acknowledges that "it may not be *natural*" to say that a buyer "uses" the item he receives in a commercial exchange (Resp. Br. 16 (emphasis added)), and rightly so. As we have explained (Br. 11-13), "[a] seller does not 'use' a buyer's consideration." *United States* v. *Westmoreland*, 122 F.3d 431, 435 (7th Cir. 1997). Indeed, "'there is no grammatically correct way to express that a person receiving a payment is thereby "using" the payment.'" *United States* v. *Sumler*, 294 F.3d 579, 583 (3d Cir. 2002) (quoting *Westmoreland*, 122 F.3d at 435); see also *United States* v. *Cotto*, 456 F.3d 25, 28 (1st Cir. 2006); *United States* v. *Stewart*, 246 F.3d 728, 731 (D.C. Cir. 2001). That is where this case should end.

Respondent's claim that the person who acquires a gun (with drugs) "uses" the gun, even though someone acquiring a cup of coffee (with cash) plainly does not "use" the coffee, is baseless. Respondent insists (Br. 16) that the word "use" carries a meaning with respect to "true barter" transactions that it does not have where "exchanges involving money" are concerned. Not surprisingly, respondent adduces no authority to support this assertion. Instead, respondent simply posits that a cash purchase "do[es] not capture the give-and-take character of any bartering transaction, in which each bartered item is central to the transaction." *Id.* But is not a cash purchase equal parts "give" and "take"? Is currency not equally "central" to a cash

transaction? Even if there were any conceivable basis for drawing such a distinction – and respondent identifies none – it is entirely far-fetched to say that Congress had in mind "true barter" but not cash transactions when it enacted § 924(c)(1)'s prohibition on firearm "use."[1]

Respondent similarly asserts (Br. 16) that the word "use" carries a different meaning in a *drug* transaction than in other commercial transactions. Even if it makes no sense to say that a purchaser "uses" a cup of coffee simply by virtue of the transaction's completion, respondent argues, the buyer of a gun nonetheless "uses" it when *drugs* are his means of payment. But respondent offers absolutely no explanation why this word means one thing in the cafeteria and another in a commercial exchange that takes place on the adjacent street corner.[2] Nor does respondent offer any evidence – because none exists – that Congress intended the term "*use*" to be given the special, unnatural, and expansive meaning respondent urges. *Smith* and *Bailey* are specifically to the contrary. Both looked to general dictionary definitions and examples from outside the U.S. Code to fix the meaning of that very term. See 508 U.S. at 229; 516 U.S. at 145-147; see also *Muscarello* v. *United States*, 524 U.S. 125, 129 (1998) (interpreting the term "carry" in accordance with literary examples, explaining that "there is nothing

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[1] The supposedly pivotal distinction between cash and other means of exchange was less evident to the government when it presented oral argument in *Smith*. Its argument – that paying for drugs with guns was "use" under § 924(c)(1) – began by stating: "If I purchase drugs with a $100 bill, I have used that $100 bill to buy drugs." Tr. Oral Arg. *Smith*, No. 91-8674, at 24.

[2] Not to trivialize the significance of the question presented, but suppose a defendant offered to supply a slightly larger quantity of drugs if the counterparty would agree to bring a gun *and* a cup of coffee to the exchange. Would one say that the purchaser "used" the gun but not the coffee? Or suppose an individual was considering buying an expensive automobile by trading a large quantity of drugs. If the seller sweetened the deal by offering to supply a gun along with the car, is there any basis to say the buyer did not "use" the car by completing the transaction but somehow "used" the gun?

linguistically special about the fact that weapons, rather than [other items] are being carried").

B. Respondent Distorts *Smith* And *Bailey*

All but conceding that no amount of staring at the statutory language can make "use" mean "receipt," respondent nonetheless asserts that this Court's opinions leave "no doubt" that trading drugs for a gun constitutes "use" of the firearm under § 924(c)(1). Resp. Br. 9-15. This argument depends on a sustained mischaracterization of what *Smith* and *Bailey* held.

1. Respondent's first misstep is to distort the holding of *Smith*. Respondent argues that "[t]he holding in *Smith* was *not* that using a firearm to obtain drugs is 'use' within the meaning of Section 924(c)(1). The holding was a broader one: that using a firearm as an item of trade or commerce in a drug transaction falls within the plain meaning of the text of the statute." Resp. Br. 12 (emphasis added). Make no mistake: Respondent's argument hinges on the assertion that *Smith actually held* that it makes no difference under § 924(c)(1) whether a defendant trades a gun for drugs or trades drugs for a gun.

Smith held no such thing. The question presented was "whether the act of *offering* a firearm, solely as an item of barter, in trade for drugs violates Title 18 United States Code Section 924(c)(1), for use of a firearm during and in relation to a drug trafficking felony," No. 91-8674 Pet. i (emphasis added), and the Court's opinion began: "We decide today whether the *exchange* of a gun *for* narcotics constitutes 'use' of a firearm 'during and in relation to . . . [a] drug trafficking crime' within the meaning of 18 U.S.C. § 924(c)(1)," 508 U.S. at 225 (emphasis added). And throughout the opinion the Court clearly was focused on the conduct of the person who trades the gun in order to receive drugs (*e.g.*, Smith); there is no suggestion that the Court further decided – or rather, offered as *dicta*, since that situation was not presented there – that *receiving* a gun in exchange for drugs is "use" of the gun.

The *Smith* majority rejected the argument that "use" of a firearm within the meaning of § 924(c)(1) should be confined to use *as a weapon*, deciding that the defendant's "use of a firearm

as an item of barter or commerce" qualified. 508 U.S. at 236-237. In so concluding, *Smith* emphasized that the defendant's conduct – "using" an item of value to acquire something else – fell within the ordinary meaning of the term, *i.e.*, to "carry out a purpose * * * by means of," *id.* at 229 (quoting BLACK'S LAW DICTIONARY at 1541 (6th ed. 1990)), and that there was no evidence that Congress intended for such use to be excluded from § 924(c)(1). The Court *did not* hold that an individual whose "purpose" in a transaction is *obtaining* a gun can equally be punished as a gun user, and the thrust of its opinion is completely to the contrary. See 508 U.S. at 235 ("[M]aking a material misstatement *in order to acquire* * * * a gun is not 'use' of the gun *even under the broadest definition of the word 'use.* '") (quoting 18 U.S.C. § 922(a)(6)) (emphasis added).

Similarly, respondent resorts to the passive voice to elide the distinction between *Smith*'s actual holding and the question presented here. Most notably, respondent urges that "[w]hen a firearm *is used* as an item of barter it does not sit on the sidelines, but plays an active role in the trafficking." Resp. Br. 12 (emphasis added). But saying that a gun "is used" in a barter transaction simply begs the essential question: "used" *by whom*? Section 924(c)(1) does not criminalize participation in a drug trafficking transaction where a firearm "is used"; it punishes defendants who actually "use" a firearm – *i.e.*, as a "means" by which to achieve a criminal purpose. *Smith* cannot possibly be read to have held that because a firearm "is used" by one who trades it for drugs, one who receives it likewise "uses" it.

2. Remaking *Smith* is not respondent's only chore. It must also try to blunt the force of the unanimous decision in *Bailey*, which held that § 924(c)(1)'s "use" prohibition authorizes punishment of only those defendants who "active[ly] employ" firearms, 516 U.S. at 150; that those who keep guns "at the ready" to facilitate their drug dealing activities are beyond the provision's reach, *id.* at 149; and that these limitations reflect Congress's intent not to punish as "use" the mere possession of a gun, even for specific criminal purposes, *id.* at 150.

a. Respondent's primary defense against *Bailey* is to replace the "active employment" analysis with an "operative factor" test.

Resp. Br. 14. Respondent's gambit rests exclusively on a single sentence from *Bailey*, which stated "'that § 924(c)(1) requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.'" Resp. Br. 14 (quoting 516 U.S. at 143). Respondent reads that to mean – the remainder of *Bailey*'s analysis notwithstanding – that a defendant may be convicted of firearm "use" if he participates in a transaction in which the gun makes an offense possible. Not so.

i. For starters, respondent simply misreads the sentence in question, which states that the active-employment test contemplates "*a use* that makes the firearm an operative factor in relation to the predicate offense." 516 U.S. at 143 (emphasis added). That requires (1) a determination that the defendant's conduct was "a use"; and (2) a *further* determination that the use is one that "makes the firearm an operative factor" in the offense. As the Court (and even the petitioners) in *Bailey* acknowledged, it did not strain common understanding to describe the conduct at issue there as "use" – and instrumental use, at that. But while there was nothing unnatural about saying "I *use* a gun to protect my house," 516 U.S. at 143, there is no natural way to say that a purchaser "uses" the item he is buying simply by completing the transaction. Accordingly, it is beside the point whether, under *Bailey*, the firearm received by petitioner was an "operative factor" (whatever that term might mean) in the transaction.

Even assuming that *Bailey* set forth an "operative factor" test, however, it surely did not hold – as respondent contends – that a firearm is an "operative factor" in a drug offense whenever it makes a drug transaction "'possible.'" Resp. Br. 13 (quoting *Smith*, 508 U.S. at 238). Equating "use" with simple "but for" causation not only would render the statutory term almost limitless, it also would fly in the face of *Bailey*'s central thrust. The government argued there that a drug dealer's placing a firearm in close proximity to his drug trafficking activities constituted "use" under § 924(c)(1) because it "facilitate[d]," "emboldened," or "enabled" the offense – *i.e.*, it made his criminal activities possible. U.S. Br. *Bailey*, Nos. 94-7448, -7492, at

10, 14; Tr. Oral Arg. *Bailey*, at 36. The Court emphatically rejected those arguments out of concern that "use" convictions on that basis would "not reasonably be distinguishable from possession," 516 U.S. at 149; see also Pet. Br. 36-37.[3]

ii. Respondent's effort to mine the *Bailey* opinion for some other support for its construction yields remarkably little. Respondent points to a sentence in *Bailey* noting that the Court was not overruling the result in *Smith*: "[T]he active-employment understanding of 'use' certainly includes brandishing, displaying, *bartering*, striking with, and, most obviously, firing or attempting to fire a firearm." Resp. Br. 15 (quoting 516 U.S. at 148 (emphasis added)). Respondent claims that the inclusion of "striking *with*" alongside "bartering" (without a preposition) is proof that the Court did not view "use" as limited to defendants, such as the one in *Smith*, who "barter *with*" guns. This could hardly be more wrong: In ordinary usage, "with" is implicit in the term "barter." And the word "for" is added when describing the object of the exchange: "The Cincinnati Reds traded *for* Tom Seaver in 1977"; the "New York Mets *traded* him." There is no meaningful contrast to be drawn with "striking *with*": without the preposition, the phrase – "striking * * * a gun" – would be nonsense. It would be a mistake, in any event, to "dissect the sentences of the United States Reports as though they were the United States Code," *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 515 (1993). Here the "plain meaning" of *Smith* and *Bailey* refute respondent's misreading.

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[3] Any suggestion that *Smith* somehow supports an "operative factor" test resting on "but for" causation is also without merit. See Resp. Br. 13 ("Just as in *Smith*, '[w]ithout it, the deal would not [be] possible.'") (quoting *Smith*, 508 U.S. at 238). The quoted language is extracted not from the Court's exposition of the term "use," but rather from its discussion of the statute's separate – and, in the Court's understanding, analytically distinct – "in relation to" requirement. See 508 U.S. at 238.

II. SECTION 924(D) OFFERS NO SUPPORT TO THE CLAIM THAT MERE RECEIPT OF A GUN CONSTITUTES "USE" UNDER § 924(C)(1)

Respondent relies heavily on the argument that the term "use" in § 924(c)(1) must have the same basic meaning as in the adjacent subsection, § 924(d). Resp. Br. 17-20. Although, as we explain below (*infra*, pp. 11-13) the decidedly passive term "intended to be used" in § 924(d) cannot fully illumine the active "use" at issue in § 924(c)(1), we do not dispute that § 924(d) is a helpful guidepost. But respondent's attempt to invoke § 924(d) to prove that "use" means "receipt" is fatally flawed. Respondent's premise – that *any* offense conduct referenced in § 924(d) must be "use" – is refuted by *Bailey*, which squarely held that some of the offense conduct § 924(d) incorporates (*e.g.*, "possession") is not use.

A. Respondent's Argument That All Elements Of § 924(d)'s Predicate Offenses Constitute "Use" Misunderstands *Smith* and Violates *Bailey*

Respondent's argument goes like this: (1) § 924(d) requires forfeiture of firearms "intended to be used" in various predicate offenses; (2) if an offense is listed in § 924(d), ***all*** of the underlying offense conduct must qualify as "use"; (3) some of the offenses listed in § 924(d) include "receipt" among the offense conduct; (4) therefore receipt equals "use." As we show below, the fundamental flaw in respondent's reasoning lies in step (2). While it is arguably true that each of the predicate offenses listed in § 924(d) includes at least *some* offense conduct that could qualify as "use," it is demonstrably *not true* that *all* of the offense conduct for each predicate offense qualifies as "use."

Respondent purports to find support in *Smith* for the assertion that *any* offense conduct included in a § 924(d) predicate offense must be "use." To be sure, *Smith* relied on the meaning of "use" in § 924(d) to illuminate its meaning in § 924(c)(1), but it did not reach so far as respondent suggests. It is helpful first to recall exactly what *Smith* said on the subject:

> Under § 924(d)(1), any "firearm or ammunition intended to be used" in the various offenses listed in § 924(d)(3) is

> subject to seizure and forfeiture. Consistent with petitioner's interpretation, § 924(d)(3) lists offenses in which guns might be used as offensive weapons. See §§ 924(d)(3)(A), (B) (weapons used in a crime of violence or drug trafficking offense). But it also lists offenses in which the firearm is *not* used as a weapon but instead as an item of barter or commerce. * * * In fact, none of the offenses listed in four of the six subsections of § 924(d)(3) involves the bellicose use of a firearm; each offense involves use as an item in commerce. Thus, it is clear from § 924(d)(3) that one who transports, exports, sells, or trades a firearm "uses" it within the meaning of § 924(d)(1) – even though those actions do not involve using the firearm as a weapon.

508 U.S. at 234-235 (footnote omitted).

Thus, *Smith* reasoned that because four of § 924(d)(3)'s predicate offenses did not involve "use" as a weapon *at all* and because two others involved "use" *only* as an item of barter or commerce, "use" in § 924(d) could not be limited to "use" as a weapon. As this Court recognized, however, that conclusion followed only because some of § 924(d)'s predicate offenses included conduct that could be construed *only* as use of a gun as an item of barter or commerce. If they had not, in particular if they had mentioned "use" as a weapon as well, this Court's conclusion would not have followed.

Respondent, however, argues as if the Court in *Smith* ignored this necessary logical step in reasoning, advancing a much broader inferential theory. According to respondent:

> In *Smith*, the Court concluded that, because provisions in Section 924(d)(1) and (d)(3) require the forfeiture of firearms "intended to be used" in various offenses, and those offenses *include* ones where the firearm is used as an item of barter or commerce, "use" in Section 924(c) must also encompass use of a firearm as an item of barter or commerce.

Resp. Br. 17 (emphasis added). In particular, respondent points to the six predicate offenses listed in § 924(d)(3) that criminalize, *among other things*, receiving a gun under certain circumstances – §§ 922(a)(1), 922(a)(3), 922(j), 922(l), 922(n),

& 924(b) – and argues that, since each *includes* receipt among the offense conduct, "use" under § 924(d)(1) necessarily encompasses mere receipt. Resp. Br. 17-20 & n.4.

At the risk of belaboring the point, the distinction between *Smith*'s analysis of § 924(d) and respondent's theory may appear subtle, but is in fact highly consequential. *Smith* (i) looked at the predicate offenses in § 924(d), (ii) observed that some of them involved either *no* use as a weapon or *only* commercial conduct, and (iii) concluded that "use" therefore could not be limited to "use" as a weapon. Respondent, however, (i) looks at the predicate offenses in § 924(d), (ii) observes that some of them *include* receipt (among other things), and (iii) argues that "use" must therefore encompass receipt. That argument – *that any and all offense conduct within § 924(d)'s predicate offenses is "use"* – thus sweeps far beyond this Court's reasoning in *Smith*.

Respondent's logic is also verifiably wrong. That much is evident from § 922(j), which is one of § 924(d)'s predicate offenses. Section 922(j) makes it unlawful "for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm * * * in * * * interstate or foreign commerce * * * knowing or having reasonable cause to believe that the firearm * * * was stolen." 18 U.S.C. § 922(j). While respondent seizes on the single verb "to receive" to argue that because § 924(d) references a "use" in § 922(j) "receipt" must be one, it overlooks the fact that § 922(j) also criminalizes "possession" of a stolen firearm. Although respondent's logic would make *any* offense conduct within § 924(d)'s predicate offenses a "use," *Bailey* left no doubt that "possession" is not "use." 516 U.S. at 143 ("Had Congress intended possession alone to trigger liability under § 924(c)(1), it easily could have so provided."). Accordingly – and flatly contrary to respondent's crucial premise – not all offense conduct within § 924(d)'s predicate offenses is a "use."[4]

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[4] It is worth noting that, in addition to "possession," § 922(j) criminalizes the "conceal[ment]" or "stor[age]" of a weapon, neither of which could satisfy *Bailey*'s active-employment definition of use.

Thus, the very most that respondent could hope to glean by comparing § 924(c)(1) to § 924(d)'s predicate offenses is that the latter *include* some conduct that could be construed as "use." And it is clear that § 924(d)'s predicate offenses include a variety of conduct that could be "use," along with a variety of conduct (including receipt) that could not. Section 922(a)(1), for example, makes it unlawful "for any person except [certain licensees] to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce." Since that provision clearly establishes some "uses" apart from receipt, respondent cannot argue that one of the remaining activities, receiving a gun, necessarily constitutes a "use." If there must be a "use" somewhere in this provision, it can logically (and linguistically *must*) lurk elsewhere.[5]

Finally, the flaw in respondent's reasoning is confirmed by *Smith* itself. The Court there recognized that Congress employed the term "intended to be used" with respect to some predicate offenses but authorized forfeiture when the firearm is merely "involved in" other predicate offenses. 508 U.S. at 235. *Smith* noted that an "examination of the offenses to which the 'involved in' language applies reveals why Congress believed it necessary to include such an expansive term," because at least some of the "involved in" offense conduct could not possibly be deemed "use" of a firearm. 508 U.S. at 235.[6] More importantly for present purposes, *Smith* focused on one of those predicate offenses, § 922(a)(6), to illustrate the point: "[M]aking a material misstatement *in order to acquire* or sell a gun," *Smith* observed, "is not 'use' of the gun *even under the broadest definition of the word 'use.'*" 508 U.S. at 235 (emphasis added). That is, where a defendant engages in criminal conduct that is

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[5] Four of the remaining provisions to which respondent points – §§ 922(a)(3), 922(l), 922(n), and 924(b) – have an almost identical structure.

[6] As we have explained (Pet. Br. 23-24) the inclusion of receipt-based offenses in § 924(d)'s "involved-in" forfeiture provision evidences Congress's intent *not* to equate "use" with "receipt."

necessary (indeed, specifically designed) "to acquire" a gun, the gun is "involved in" the offense but not "used" by the defendant. Just as "a gun with respect to which a material misstatement is made * * * is not 'used' in the offense," *ibid.*, a gun with respect to which drugs are traded in order to obtain it is not "used." In sum, *Smith* not only provides no refuge for respondent's § 924(d) arguments, it belies the notion that simply doing an act in order to obtain an object "uses" the object.

B. Section 924(d)'s Specialized Purpose And Passive Grammatical Construction Deny It A Dispositive Role In Interpreting § 924(c)(1) In This Case

Respondent's argument that § 924(d) compels its reading of § 924(c)(1) in this case fails for another reason. Even if each of the provisions respondent points to criminalized *only* receipt (and they do not), deep differences between § 924(c)(1) and § 924(d) limit the insight the latter provides here.[7] First, as this Court has recognized, "§ 924(d) is not an additional penalty for the commission of a criminal act," as § 924(c)(1) is, "but rather is a separate civil sanction remedial in nature." *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 366 (1984). Second, as a civil forfeiture provision, § 924(d) aims at the property, not the person. See *United States* v. *Bajakajian*, 524 U.S. 321, 330 (1998). It provides an *in rem* action against a thing, *89 Firearms*, 465 U.S. at 366, whereas § 924(c)(1), a primarily sentence-enhancing provision, proceeds *in personam* against a criminal defendant. As this Court explained in

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[7] It is important to note that these differences were not relevant in either *Smith* or *Bailey*. In *Smith*, the Court looked to § 924(d) only to determine if "use" under § 924(c)(1) was limited to use "as a weapon." 508 U.S. at 234-235. Its § 924(d) inquiry ran only to the character of the "use." Since that "use," giving a gun in return for drugs, was indisputably active, the significance of § 924(d)'s more encompassing passive construction was not at issue. Similarly, in *Bailey*, the Court looked to § 924(d) only to show that had Congress wanted to broaden application of § 924(c)(1) beyond "actual use" it knew how to do so. 516 U.S. at 146. Congress's employment of broader language – "intended to be used" – in § 924(d)(1) was evidence, the Court believed, that § 924(c)(1)'s simple "use" had more precise and limited meaning.

Bajakajian, "[h]istorically, the conduct of the property owner [in civil forfeiture actions] was irrelevant; indeed, the owner of forfeited property could be entirely innocent of any crime." 524 U.S. at 330. So long as forfeiture proceedings are civil, not criminal, affected property can be confiscated from anyone – even if the owner has no relation to any underlying crime. *Origet* v. *United States*, 125 U.S. 240, 246 (1888).

The grammatical construction of § 924(d) reflects this difference. This subsection provides that "[a]ny firearm * * * involved in or used [in various offenses or] intended to be used [in certain other offenses] is subject to seizure and forfeiture * * *." Unlike provision establishing criminal liability or the length of criminal sentences, it employs the passive grammatical voice and subjects to forfeiture any firearm "intended to be used" by anyone, not just by someone subject to criminal liability, in one of the referenced substantive offenses. Thus, consistent with the long-recognized purposes of civil *in rem* forfeiture actions, it reaches an item intended to be employed in particular activities – no matter who employs it.

Section 924(c)(1), by contrast, focuses on the actions of particular individuals. It speaks in the active grammatical voice and imposes a lengthy sentence on a criminal defendant who, "during and in relation to any * * * drug trafficking crime * * * uses * * * a firearm * * *." 18 U.S.C. § 924(c)(1) (emphasis added). The active voice connects the use of a firearm to the defendant. In order for a court to impose the sentence, he, not someone else, must "use" the gun.

In this important sense, § 924(d) sweeps more broadly than § 924(c)(1). It provides for forfeiture of guns "intended to be used" in certain enumerated transactions no matter who intends to use them. Section 924(c)(1), on the other hand, operates only when a particular individual "uses" a gun. It respects the fundamental principle of the criminal law that, except in special circumstances, one cannot be sanctioned purely for someone else's behavior. Although "use" of a gun by someone somewhere in one of § 924(d)'s specified transactions can be grounds for civil *in rem* forfeiture, "[use] in the air, so to speak, will not do," *Palsgraf* v. *Long Island R.R. Co.*, 162 N.E. 99, 99

(N.Y. 1928), to subject a person to criminal punishment under § 924(c)(1). Respondent ignores this large and important difference between § 924(d) and § 924(c)(1).

III. NO POLICY CONSIDERATION SUPPORTS GIVING "USE" AN UNNATURAL CONSTRUCTION

Respondent repeatedly argues that giving "use" a broad and unnatural meaning is warranted by policy considerations – namely Congress's commitment to combating the "'dangerous combination' of 'drugs and guns.'" Resp. Br. 22 (quoting *Muscarello*, 524 U.S. at 132, and *Smith*, 508 U.S. at 240). But this Court's decisions long ago settled that even the most compelling policy considerations provide no legitimate ground for judicial "enlarge[ment]" of a federal criminal statute, see *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 105 (1820) (Marshall, C.J.), and the very policy argument advanced here was presented – and rejected – in *Bailey*, see U.S. Br. *Bailey*, Nos. 94-7448, -7492, at 38 (quoting *Smith*). Indeed, the argument for bending statutory text to advance this purpose is in every way weaker in this case than it was in *Bailey*.

For example, while respondent implies that *Bailey* dealt only with "locked-away weapons" (Br. 14), the decision expressly held that the "use" prong did not authorize punishment of a drug dealer who kept a gun "at the ready for an imminent confrontation," 516 U.S. at 149.[8] Moreover, the government in *Bailey* could point to at least some evidence that Congress actually intended for the activity at issue – possession of a weapon to protect a "fortress" or embolden a drug dealer – to be punished as "use." See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 6212, 102 Stat. 4360 (1998) (amendment to reach

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[8] Indeed, the convictions invalidated by *Bailey* included those of large-scale drug dealers who kept loaded, automatic weapons at hand, with every intention of using them (as weapons) if necessary, to accomplish criminal purposes. *E.g.*, *United States* v. *Matra*, 841 F.2d 837, 839 (8th Cir. 1988) (defendant arrested in house with seven guns, including loaded assault rifle and loaded submachine gun, hundreds of rounds of ammunition, and 565 grams of cocaine), abrogation recognized by *United States* v. *McKinney*, 120 F.3d 132, 133 (8th Cir 1997).

gun use during and in relation to possession with intent to distribute offenses). Thus, in *Bailey*, the government could argue plausibly that employment for security purposes was the most common way that such offenders "used" such weapons. See Pet. Br. at 35-36. By contrast, there is no evidence that Congress had "drug-wielding" gun buyers in mind when enacting (or amending) § 924(c)(1).

Meanwhile, "the obvious congressional intent to require more than possession" that *Bailey* found sufficient to rebut the government's policy arguments, 516 U.S. at 144, applies more directly and forcefully in this case. The appellate decisions *Bailey* overturned already recognized that "mere possession" was not enough, see *id.* at 143 (D.C. Circuit rule required "proximity and accessibility"), but the Court concluded that, in practice, these rules would not sufficiently respect that legislative judgment. Here, far from accepting a "possession plus" limitation, as did the D.C. Circuit's *Bailey* rule, respondent's construction would extend "use" to "possession minus." See *United States* v. *Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005) (vacating conviction under "use" prong of defendant arrested before ever taking possession of guns).

Unsurprisingly, respondent's policy argument spends less time on *Bailey* than on *Smith*, which it gamely describes as "reaffirmed" by *Bailey* (Br. 6, 11, 27) and characterizes as holding that "the presence of [a] firearm at the drug transaction" is a basis for punishment under the "use" prong (*id.* 24). If "introduction [of guns] into the scene of drug transactions" (Br. 22 (quoting 508 U.S. at 239 and *Harris* v. *United States*, 959 F.2d 246, 262 (D.C. Cir. 1992))), is "use," the Government insists, "it would make no sense for Congress to penalize one who brings a gun to trade for drugs but ignore[] the drug dealer who takes a gun from that person" (Br. 23-24).

That argument is wrong many times over. First, unlike § 924(d)'s forfeiture provision, § 924(c)(1) is not an *in rem* remedy against firearms that are "present" or "introduced" in a criminal transaction. Moreover, *Bailey* made clear that presence is not (nearly) enough to convict even the person who "introduce[s] a weapon into the scene"; punishment is

authorized only for the person who brings "his gun" to commit a crime (rather than "leaving [it] at home," 114 Cong. Rec. 22,231 (1968) (Rep. Poff)) *and* "actively" employs it. Thus, while *Bailey*'s construction of the provision was "not inconsistent" with the result in *Smith*, *Bailey* rejected, rather than "reaffirmed," any suggestion in *Smith* that presence or "facilit[ation]," 508 U.S. at 238 (or even "potential * * * facilitat[ion]," *id.*) would be "use." See *Stewart*, 246 F.3d at 731 ("[T]he interpretation of 'use' we employed in *Harris* does not survive after *Bailey*"); *Jones* v. *United States*, 529 U.S. 848, 856 (2000) (*Bailey* "reject[ed] the Government's argument that a gun is 'used' whenever its presence 'protects drugs' or 'emboldens' a drug dealer").

The phenomenon respondent purports to find baffling – treating parties on different sides of a criminal transaction differently – is ubiquitous in the criminal law. See Pet. Br. 26-27 (citing different statutory treatment of those who distribute and purchase drugs). And there is no contention here that Congress "ignored the conduct" of Mr. Watson and others who "take[] guns." Mr. Watson's conduct resulted in convictions for violating two federal statutes, 18 U.S.C. § 922(g) and 21 U.S.C. § 841(a)(1), producing a stiff sentence. Cf. *Wiltberger*, 18 U.S at 105 (even where it can "conceive no reason why [defendant's acts] * * * should not be punished * * * this Court cannot enlarge [a criminal] statute").

So clarified, there is nothing remotely counterintuitive, let alone "sense[less]" (Resp. Br. 23), about giving effect to the provision as Congress enacted it. The distinction drawn is entirely consistent with what this Court – at the Government's repeated urging – has described as the policy animating § 924(c)(1): to "persuade the man who is tempted to commit a Federal felony to leave his gun at home." *Muscarello*, 524 U.S. at 132 (quoting Poff statement). U.S. Br. *Bailey* at 28; U.S. Br. *Smith*, No. 91-8674, at 9; see also Tr. Oral Arg. at 38, *Smith*, *supra* ("[W]e think that the statute should be construed in accordance with that literal language, as the original sponsor of the statute indicated, Congressman Poff.").

Even if judicial enforcement of Congress's policy judgments depended on proof that they are "sensible," the justification for this difference is blazingly obvious: those who exercise dominion and control over guns have the power to intimidate, deter, or physically harm those with whom they interact in ways that gun-seeking, "drug-wielding" individuals such as Mr. Watson do not. That is why even decisions rejected by *Bailey* for imposing liability too expansively had held possession of the gun to be an indispensably necessary prerequisite for punishment. *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.), recognized as overruled by *Bailey* in *United States* v. *Hernandez*, 80 F.3d 1253 (9th Cir. 1996); *United States* v. *Long*, 905 F.2d 1572, 1577 (D.C. Cir. 1990) (Thomas, J.).

"Experience [may] demonstrate[]," that a gun "can be converted instantaneously from currency to cannon," (Resp. Br. 22 (quoting *Smith*, 508 U.S. at 240)), but only by the person who possesses it. And any "not implausible scenario[]" in which a gun could be employed by a recipient "to injure or kill somebody'" (Resp. Br. 24 (quoting *United States* v. *Phelps*, 895 F.2d 1281, 1286, 1288 (9th Cir. 1990) (Kozinski, J., dissenting from denial of rehearing en banc))), would surely involve further, *active* use after receipt – *which would be punishable under § 924(c), without the rule the Government seeks here.* See, e.g. Resp. Br. 24 (hypothesizing case of "recipient of an unloaded firearm" who then "'display[s it] * * * [to] instill fear in others'") (citing *McLaughlin* v. *United States*, 476 U.S. 16, 17 (1986)).

Indeed, even the symmetry that respondent claims for its rule turns out to be illusory. In cases like *Smith*, defendants may be prosecuted whether or not the drugs actually change hands – because *attempted* possession is itself a drug trafficking offense. See *United States* v. *Burgos*, 254 F.3d 8, 11-12 (1st Cir. 2001). But the Government's theory here (though not in previous cases) appears to be that it was Mr. Watson's "accepting" or "taking" (Br. 7, 9) the gun that made it use. The reason for this evident shift is not difficult to fathom – it is especially hard to claim that a test requiring "active use" and (substantially) more than "mere possession" is met in a case, such as *Montano*, where the

defendant never even gained possession of the gun. But this more credible stance comes at a price: It compromises respondent's ability to deny the obvious "difference" between the gun-wielding attempted drug-possessor and the "drug-wielding" individual on the other side of the transaction.

Respondent's attempt (Br. 23) to transplant the "line drawing" discussion from *Smith* likewise misses the point. The "fine * * * distinction[s]" that concerned the *Smith* majority arose from the fact that the person who brings his firearm with him to the scene of a drug purchase may, at different moments, be brandishing, displaying, or referring to the weapons – indeed he may be doing these at the same time. Whatever difficulty juries might have applying a test (like the one advocated in the *Smith* dissent) that treated only some of this conduct as "use" are absent here: A rule that tracks the ordinary distinction between use and receipt is a matter of common sense. Guns do not lose their "'destructive capacity'" (Resp. Br. 22 (quoting 508 U.S. at 240)) when used as currency, but that capacity is not available to a recipient until after he takes possession – and it is not punishable until the capacity is actively put to use.

Nor is there merit to the startling suggestion (Resp. Br. 13-14 n.2) that society's interest in discouraging *drug trafficking* is reason for judicially re-writing § 924(c)'s "use" provision. Respondent (quoting *United States* v. *Frederick,* 406 F.3d 754, 764 (6th Cir. 2005)) notes that if those in Mr. Watson's position "did not accept possession of the gun, and instead insisted on being paid fully in cash for * * * drugs, some drug sales – and therefore some drug trafficking crimes – would not take place." *This* drug trafficking crime, of course, would not have taken place had the agent not urged Watson to use drugs, rather than cash, as the payment medium (and the market effects of assuring drug sellers that buyers will arrive unarmed are not self-evident). There is, to say the least, not the slightest indication that Congress enacted § 924 to chip away at the volume of drug sales, by discouraging sellers from servicing the segment of the drug-buying public that (even after *Smith*) prefers to pay with weapons, rather than cash.

Respondent – likely aware of its highly ambiguous significance – confines to a footnote (Br. 25 n.6) an explicit version of the argument on which much of its submission implicitly depends: that because he is supposedly jointly responsible for the danger, it would be permissible to punish an individual in Mr. Watson's position on a secondary liability theory as "an aider and abettor." See also Br. in Opp. 8-9 (arguing that individuals can be prosecuted under "possession in furtherance" language of § 924). Respondent acknowledges that it did not proceed against Mr. Watson on either theory – and that it could not have charged him as an aider and abettor, because, *inter alia*, the "offense" he encouraged was no § 924 violation at all (but rather a law enforcement operation, conducted under controlled conditions by government agents, intent on adding the enhancement to the sentence he faced for being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1)).[9] The Court should not uncritically accept respondent's assertions about these other theories, which are not before the Court. But if the Government were right, that would be yet another reason for *not* contorting the statute's "use" prong here.

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[9] Respondent's attempt to turn the undeniable scent of government-manufactured crime to its advantage (Br. 24, citing *United States* v. *Jimenez Recio*, 537 U.S. 270, 276 (2003)) cannot succeed. That concerns about "entrapment like" behavior are not reason to modify an otherwise appropriate and correct legal rule surely does not support giving a statute a construction incompatible with its plain meaning to *encourage* tactics that push the entrapment line. And *Jimenez* did not overturn longstanding precedent recognizing that statutes should be construed in ways that minimize "arbitrary enforcement." *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988). That concern is obviously implicated here – not merely because so many of these cases involve "gun barterers" who are government agents (hardly surprising, given what the *Smith* rule provides), but because the legal rule respondent advances, where decades-long sentences depend on law enforcement officers' decisions whether or not to hand over a gun before arrest, truly does enshrine a "distinction" without a legitimate public safety "difference."

IV. RESPONDENT'S ACCOUNT OF THE LENITY DOCTRINE IS INCOMPLETE AND MISLEADING

In our opening brief (at 9-38), we explained that the statutory interpretation issue here may – and should – be resolved in petitioner's favor without recourse to the rule of lenity and related canons of construction. Although it would be asking a lot to expect the Government to welcome (in a case where it had not already confessed error) that doctrine's application,[10] respondent's boilerplate presentation – a pastiche of especially restrictive language – is sufficiently misleading and incomplete to warrant a brief response.

First, decisions rendered after the ones cited in respondent's brief take a less stinting view of lenity's domain. See *Scheidler* v. *NOW, Inc.*, 537 U.S. 393, 408-409 (2003) (a "criminal statute * * * must be strictly construed, and any ambiguity must be resolved in favor of lenity" * * * * [W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language") (quoting *McNally* v. *United States*, 483 U.S. 350 (1987)); *Cleveland* v. *United States*, 531 U.S. 12 (2000) (same). Respondent's assertion that the rule "comes into play *only* when there is a 'grievous ambiguity'" (Br. 29 (emphasis added)) cannot account for decisions cited (Pet. Br. 40 & n.10) that rely on lenity as an additional, alternative ground for rejecting an interpretation advanced by the government.

The self-serving boilerplate also ignores opinions, such as the unanimous decision in *Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005), that apply rules of narrow construction, but would not turn up in a database search for "lenity." See

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[10] Compare, e.g., U.S. Br. *Leocal* v. *Ashcroft*, No. 03-583, at 37 n.17 (arguing lenity doesn't apply); U.S. Br. *Arthur Andersen LLP* v. *United States*, No. 04-369, at 38 (same); and U.S. Br. *Castillo* v. *United States*, No. 99-658, at 44 n.26 with *Leocal* v. *Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (holding lenity rule would "constrain" court "to interpret any ambiguity in the statute in [the defendant's] favor"); *Castillo* v. *United States*, 530 U.S. 120, 131 (2000) (same); and *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703 (applying traditional rule of "restraint in assessing the reach of a federal criminal statute") (internal quotation marks omitted).

id. at 703 (relying on "traditional [rule of restraint]" in construing criminal laws, described as grounded in "deference to the prerogatives of Congress * * * and * * * concern [for] 'fair warning'"); *Cleveland*, 531 U.S. at 25 (government must point to "clear and definite" statutory language to obtain "the harsher [of two] alternative [constructions]").

More important, these and other cases make clear that while the "rule of lenity" *per se* may not be expansive, the principles on which it is grounded – fair notice, congressional law-making, maintaining the state-federal balance, and avoiding arbitrary enforcement – find expression in a number of other overlapping and mutually reinforcing canons and doctrines. See, *e.g.*, *Bousley* v. *United States*, 523 U.S. 614, 620 (1998); *City of Chicago* v. *Morales*, 527 U.S. 41, 56-60 (1999) (due process vagueness); *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (federalism clear statement rule).

There is no urgent need here for a definitive restatement of the rule of lenity, because *every* tool of construction – most notably, the rule that a statute should be given its plain meaning – stands strongly against the expansive, legislatively unauthorized, arbitrary, and unforeseeable construction of § 924(c)(1) respondent asks the Court to endorse.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MICHAEL A. WATSON,

PETITIONER,

v.

UNITED STATES,

RESPONDENT.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF GUN OWNERS FOUNDATION AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Gun Owners Foundation ("GOF") and Conservative Legal Defense and Education Fund ("CLDEF") were established as nonprofit corporations in the Commonwealth of Virginia in 1983 and in the District of Columbia in 1982, respectively. Both *amici* are nonprofit educational organizations, exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code and dedicated, *inter alia*, to the correct construction, interpretation and application of the law.[1]

GOF primarily engages in nonpartisan research and public education and assistance concerning the construction of constitutions and statutes related to the right of citizens to bear arms, and engages in public interest litigation in defense of human and civil rights secured by law, including the defense of the rights of crime victims, the right to own and use firearms, and related issues. CLDEF engages in nonpartisan research and education and public interest litigation, particularly that related to the correct construction of the Constitution and federal and state statutes. In the past, each of the *amici* has filed *amicus curiae* briefs in other federal litigation, including matters before this Court, involving constitutional issues.[2] Both *amici* are interested in the preservation of the separation of powers and principles of federalism advanced by the strict construction of federal criminal laws.

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court.

SUMMARY OF ARGUMENT

At issue in this case is whether the prohibition against a person who, "during and in relation to ... a drug trafficking crime uses ... a firearm," as provided for in 18 U.S.C. Section 924(c)(1)(A), applies to a defendant who received a firearm in exchange for illegal drugs.

In the recent past, this Court has construed this prohibition, guided only by the general rule of construction that the language be understood according to its ordinary or natural meaning, subject only to a narrower construction of any residual ambiguity under the rule of lenity. *See, e.g.*, Smith v. United States, 508 U.S. 223 (1993). The reach of a federal criminal statute should, however, be governed at the outset by a rule of strict construction, confining the Court to the words of the statute, all reasonable doubts concerning the meaning of those words resolved in favor of the defendant. *See* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) and Harrison v. Vose, 50 U.S. (9 How.) 372, 378 (1850).

This rule of strict construction is not like the rule of lenity, in two respects. First, unlike the rule of lenity, the rule of strict construction is designed to operate in the first instance to preclude a broad reading of the language of a criminal statute. Second, unlike the rule of lenity, the rule of strict construction is designed to limit prosecutorial discretion and to advance individual liberty, not be employed to show leniency to a defendant as a matter of judicial equity.

The rule of strict construction of criminal statutes is deeply rooted in the common law, so well-established that it was affirmed without citation of authority by this Court as late as 1955. In contrast, the rule of lenity is of recent origin, emerging as a rule in the 1960's and 1970's, yet it has

swallowed up the rule of strict construction.

The conflict and confusion over the meaning of "uses ... a firearm" in this case reflects the shortcomings of the rule of lenity and the adverse consequences of misusing the rule of lenity as a device to avoid the rule of strict construction, especially in firearms cases. More specifically, in the construction of the penal provisions of 18 U.S.C. Section 924(c)(1)(A), this Court has failed to recognize that the meaning of use is "inordinately sensitive to context," having wandered away from the words of the criminal prohibition, consulting indiscriminately dictionary definitions and the civil forfeiture provisions of the Gun Control Act of 1968 ("Gun Control Act"), 82 Stat. 1213. By extracting the word "use" from its criminal context, the Court has rejected a narrower reading of the term under the rule of lenity, having promoted a kind of loose-leaf analysis of the meaning of use, embedded in extra textual considerations of Congressional concerns about the "dangerous combination" of "drugs and guns."

According to the rule of strict construction, it is not enough that a firearm was "actively employed" or an "operative factor" in the drugs for gun transaction, as some lower courts have concluded. Rather, it must be proved that the **defendant used** the firearm provided to him in a drug deal and that the **defendant's use** of that firearm occurred "**during and in relation to**" that drug deal. After all, the *actus reus* element of any crime must be committed by the defendant, and not by someone else.

In ordinary parlance, the defendant's relationship to the firearm in this case would not be described by the word "use," but by the word "receive." Significantly, the Gun Control Act contains a number of offenses, the *actus reus* element of which is "receive." Yet, not one of these offenses criminalizes a

person who **contemporaneously** receives a firearm in exchange for illegal drugs. Instead, 18 U.S.C. Section 922(g) prohibits the receipt of a gun by a person who may have been convicted of a illegal drug deal in the **past.** And Section 924(b) prohibits the receipt of a firearm intended or reasonably expected to be used to commit an illegal drug deal in the **future.** The rule of strict construction, however, precludes a court from filling in this gap by imputing an unnatural meaning to the word "use" to cover the receipt of a firearm for illegal drugs in the **present**, and for good reason.

The rule of strict construction was crafted to preclude the very kind of police and prosecutorial discretion exercised in this case, transforming a single transaction into three felonies without the necessary justification of a clearly applicable criminal prohibition.

Further, the rule of strict construction would serve the constitutional principle of federalism, providing real limits to the reach of federal law, and requiring Congress to speak with increasing clarity in the area of law that is arguably outside its enumerated powers, having been reserved by the Tenth Amendment to the States.

ARGUMENT

In the recent past, this Court has grappled with the meaning of the two phrases — "uses or carries a firearm" and "during and in relation to" — that appear in 18 U.S.C. Section 924(c)(1)(A). *See* Smith v. United States, 508 U.S. 223 (1993); Bailey v. United States, 516 U.S. 137 (1995); and Muscarello v. United States, 524 U.S. 125 (1998). In two of these cases, the Court has wrestled with the meaning of "uses ... a firearm." *See* Smith, 508 U.S. at 228-37; Bailey, 516 U.S. at 138, 142-50. Yet its meaning remains unclear and, once again, is before the

Court. This time, the question is whether a person who receives an unloaded firearm from a person in exchange for illegal drugs has "use[d]" that firearm "during and in relation to" the sale of those illegal drugs, within the meaning of 18 U.S.C. Section 924(c)(1)(A).

I. THE RULE OF STRICT CONSTRUCTION OF CRIMINAL STATUTES APPLIES IN THIS CASE.

A. Recently, this Court Has Applied General Rules of Statutory Construction to 18 U.S.C. Section 924(c)(1)(A).

In both Smith and Bailey, this Court sought to ascertain the meaning of "uses ... a firearm" and "during and in relation to" without guidance of any rule specifically designed to govern the construction of a criminal statute. *See* Smith, 508 U.S. at 228; Bailey, 516 U.S. at 142-43. Rather, as the Smith Court indicated, it would be guided by a general rule of construction that "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning," in light of the entire "statutory scheme," just as it would do in the construction of a civil statute. *See* Smith, 508 U.S. at 228 and 233 (citing United Savings Assn. of Texas v. Timbers of Inwood, 484 U.S. 365, 371 (1988)).

Only after employing this general rule of construction did the Smith Court acknowledge the possibility that a "narrower construction" might be appropriate because the statute at issue was a criminal one. Smith, 508 U.S. at 239. According to Smith, however, a narrower construction would be warranted only under "the rule of lenity," a rule that applies only where, "'**after seiz[ing] everything from which aid can be derived**' the Court is '**left** with an ambiguous statute.'" *Id.* (emphasis added). After combing not only the language of Section 924(c)

defining a **criminal** offense, but also the language of Section 924(d) providing for **civil** forfeiture,[3] the Smith Court found no ambiguity. Thus, it rejected a narrower construction — more lenient to defendants — imputing to Congress the policy view derived from its observation that "[w]hen Congress enacted the current version of § 924(c)(1), it was no doubt aware that drugs and guns are a dangerous combination":

> We therefore see no reason why Congress would have intended courts and juries ... to draw a fine metaphysical distinction between a gun's role in a drug offense as a weapon and its role as an item of barter; it creates a grave possibility of violence and death in either capacity. [Smith, 308 U.S. at 240.]

Such an approach to statutory construction has no place in analyzing the elements of a criminal statute, especially one which carries a minimum prison term, with no specified maximum, to be consecutively served after the sentence imposed for the predicate crime, as provided for in 18 U.S.C. Section 924(c)(1)(A).

B. The Reach of Federal Criminal Statutes Should Be Governed by a Rule of Strict Construction.

For over 135 years, a rule of strict construction fixed the parameters of construction of a federal criminal statute to "the letter of the statute,"[4] "all reasonable doubts concerning its meaning ... operat[ing] in favor of the [defendant]." Harrison v. Vose, 50 U.S. (9 How.) 372, 378 (1850). Grounded in the separation of powers principle that "[i]t is the legislature, **not**

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[3] *See* Smith, 508 U.S. at 233-36.

[4] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

the Court, which is to define a crime, and ordain its punishment," Chief Justice John Marshall insisted that the rule of strict construction required that "the intention of the legislature is to be collected from the **words** they employ." United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 95 (1820) (emphasis added). Furthermore, designed to protect "the **rights** of individuals,"[5] the doctrine of strict construction guarded against an overreaching executive department that would insist on reading a statute "in a broad sense" to reach conduct not specifically described in the statute. *See* Fasulo v. United States, 272 U.S. 620, 625-26 (1926). Indeed, Justice Holmes — applying the rule of strict construction — found that "motor vehicle," appearing in a statute prohibiting the transportation thereof in interstate or foreign commerce, knowing it to be stolen, did not include a stolen airplane:

> When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies.... [McBoyle v. United States, 283 U.S. 25, 27 (1931).]

Over the next 24 years, the Court had several occasions to apply the rule, doing so without hesitation,[6] culminating in 1955 with the statement "[t]hat criminal statutes are to be construed strictly[,] a proposition which calls for the citation of no authority." United States v. Bramblett, 348 U.S. 503, 509 (1955).

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[5] *Id.* (emphasis added).

[6] *See, e.g.*, United States v. Resnick, 299 U.S. 207, 209-10 (1936); Pierce v. United States, 314 U.S. 306 (1941); United States v. Halseth, 342 U.S. 277, 280-81 (1952).

In the same year, however, without any mention of the rule of strict construction, this Court applied a new limiting doctrine, invoking "lenity" on behalf of a person who had been charged with two counts of violation of the Mann Act arising from a single act of interstate transportation of two women for immoral purposes, refusing to attribute to Congress "an undeclared will" to "turn[] a single transaction into multiple offenses." Bell v. United States, 349 U.S. 81, 83-84 (1955). Initially, the Court applied the rule of lenity without reference to the rule of strict construction, as it had in Bell, to ameliorate the reach of a criminal prohibition. *See* Rewis v. United States, 401 U.S. 808, 812 (1971). Soon thereafter, however, the Court substituted the "rule of lenity" for the rule of strict construction, invoking it only **after** the application of a general rule of statutory construction, and only if that general rule left the Court with a residual ambiguity. *See* United States v. Bass, 404 U.S. 336, 347 (1971), as cited in Smith, 508 U.S. at 239.

Thus, in Huddleston v. United States, 415 U.S. 814 (1974) — a case involving the construction of the 18 U.S.C. Section 922(a)(6) prohibition against knowingly making a false statement "in connection with the acquisition" of a firearm from a federally-licensed dealer — the Court did not invoke the rule of strict construction in its analysis of whether the statute covered "redemption of a firearm from a pawnshop." Rather, it engaged in a wide-ranging search for the intent of Congress, beyond the language of the statute, tacking on at the end of its analysis, a short paragraph treating the Bramblett rule of strict construction as a secondary tool to be employed only if there were a residual "ambiguity" in the meaning of the word that it had already dissected and clarified. Huddleston, 415 U.S. at 819-31.

Remarkably, the Huddleston Court purported to find its "rule of lenity" approach not only in Bramblett, but in Chief

Justice Marshall's opinion in Wiltberger. *See* Huddleston, 415 U.S. at 830-32. But the venerable chief justice's opinion invoked the rule of strict construction at the front end of his analysis of the meaning of the words at issue in the case, and, consequently, his search for "legislative intent" was circumscribed by the statutory language:

> The intention of the legislature is to be collected **from the words they employ**.... The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. [Wiltberger, 18 U.S. at 95-96 (emphasis added).]

Not only did the Huddleston Court disregard this salutary rule of construction, but it coupled its citation of Wiltberger with "lenity,"[7] a concept that was linked in Marshall's day to the executive "pardon" power,[8] not to a rule of law to be applied by the courts. Indeed, during the period from the early 19th century through the first third of the 20th century, this Court associated "lenity" to acts of mercy, not to a rule of statutory interpretation. *See, e.g.*, Sprigg v. Bank of Mt. Pleasant, 39 U.S. (14 Pet.) 201, 206 (1840); United States v. Ford, 99 U.S. 594, 600 (1879); Dunn v. United States, 284 U.S. 390, 393 (1932). Even as late as 1961, this Court recognized that the rule of lenity, as rule of statutory construction, was ill-suited to the "function of the judiciary" in that its "overriding consideration [was] being lenient to wrongdoers.". *See* Callanan v. United States, 364 U.S. 587, 596 (1961).

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[7] *See* Huddleston, 415 U.S. at 830-31.

[8] *See* The Anna Maria, 15 U.S. (2 Wheat.) 327, 333 (1817).

Despite this observation, the rule of lenity has persisted as a substitute for the rule of strict construction of a criminal statute, invoked only in the rare case where the Court finds a "statutory ambiguity" after it has freely combed through "dictionaries, surveys of press reports, [and] the Bible [to] tell us, dispositively, what [a word] means embedded in [18 U.S.C.] § 924(c)(1)." *See* Muscarello v. United States, 524 U.S. at 142-43 (Ginsburg, J., dissenting).

A survey of the application of the rule of lenity as a rule of statutory construction has concluded that the rule, and its concomitant admonition "in favor of [a] narrow reading" of a criminal statute, has been applied only once to a federal gun control statute. *See* D. Per-Lee, "Supreme Court's Views as to the 'Rule of Lenity' in the Construction of Criminal Statutes" ("Lenity as a Rule of Construction"), 62 L.Ed.2d 827, 831 (1981), citing United States v. Bass, 404 U.S. 336 (1971). In all of the other gun cases surveyed, the Court, after finding no "ambiguous" statutory residue, found no occasion to resort to the narrowing rule of lenity. D. Per-Lee, "Lenity as a Rule of Construction," at 831.

The difference between strict construction of a federal criminal statute and the application of the rule of lenity is profound. The premise of strict construction is that, even though words may be polymorphic, each usage of a word in context has only one meaning. Strict construction is based on principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited; and to insure that a legislature speaks with special clarity when marking the bounds of criminal conduct. Moreover, strict construction is applied at the outset of the analysis, the inquiry seeking the precise meaning of the particular Congressional usage of words, using traditional contextual and other clues. Strict construction requires that

courts decline to impose punishment for actions that are not plainly and unmistakably proscribed.

The rule of lenity is applied at the end of the inquiry, and only if an ambiguity exits after "seiz[ing] everything from which aid can be derived." Smith, 508 U.S. at 239. Although the rule of lenity gives the appearance of construing a criminal statute in favor of lenity toward an accused, it gives judges license to look beyond the meaning of the particular usage in the text to matters not apparent from the words of the proscribed conduct, such as perceived underlying Congressional policy. As a result, few ambiguities are ever found, and the rule is applied only in a rare case.

C. The Conflict and Confusion over the Meaning of "Uses ... a Firearm" Is Best Resolved by a Return to the Rule of Strict Construction.

While four courts of appeals have approached the question by a careful examination of the statutory language to ascertain whether the ordinary meaning of the word "use" made sense when applied to the receipt of a firearm in exchange for drugs,[9] they are in the minority. Six courts of appeals have failed to conduct such an examination.[10] For example, despite its

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[9] *See* United States v. Stewart, 246 F.3d 728, 729-33 (D.C. Cir. 2001); United States v. Warwick, 167 F.3d 965, 975-76 (6th Cir. 1999); United States v. Westmoreland, 122 F.3d 431, 434-36 (7th Cir. 1997); and United States v. Montano, 398 F.3d 1276, 1281-84 (11th Cir. 2005).

[10] *See* United States v. Cotto, 456 F.3d 25, 27-30 (1st Cir. 2006); United States v. Sumler, 294 F.3d 579, 581-83 (3d Cir. 2002); United States v. Harris, 39 F.3d 1262, 1269 (4th Cir. 1994); United States v. Ulloa, 94 F.3d 949, 955-56 (5th Cir. 1996); United States v. Cannon, 88 F.3d 1495, 1509 (8th Cir. 1996); and United States v. Ramirez-Rangel, 103 F.3d 1501, 1506 (9th Cir. 1996).

recognition that according to the "the most natural reading of the statute, [the defendant] did not 'use' the guns by bartering for them," the First Circuit chose to disregard the "common understanding of [use]." Cotto, 456 F.3d at 28. Additionally, after acknowledging that "'there is no grammatically correct way to express that a person receiving payment is thereby "using" the payment,'" the Third Circuit nevertheless concluded that this Court had established in Smith and Bailey that "'use' means 'barter,'" and, as "Humpty Dumpty ... said, 'When I use a word ... it means just what I choose it to mean neither more nor less.'" Sumler, 294 F.3d at 583. Thus, the Third Circuit explained, it was "not free to ignore a dictated definition" of this Court, no matter how "grammatically [in]correct." *Id.*

The Fourth and Eighth Circuits, also citing Smith, concluded that receiving a gun in exchange for drugs and receiving drugs in exchange for a gun, was, as the Eighth Circuit put it, "a distinction without a difference." *See* Cannon, 88 F.3d at 1509. *See also* Harris, 39 F.3d at 1269.[11] Yet, just a year after the Eighth Circuit's opinion in Cannon, the U.S. Court of Appeals for the Ninth Circuit handed down an opinion that demonstrates dramatically that it does make a difference whether a person trades a firearm for drugs, or receives a firearm for drugs. In Ramirez-Rangel, two defendants received Section 924(c)(1)(B)(ii)'s mandatory 30-year sentences, even though there was no evidence that they knew that a government undercover agent had placed "two AK-47 machine guns" in a

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[11] Although the Fifth Circuit engaged in a more extensive discussion as to whether Smith had been overruled by Bailey, it had already concluded that "no more need be said" than that "*Smith* was not 'distinguishable on the basis that here the defendant owned the drugs and was bartering them for the firearms, while in *Smith* the defendant owned the firearm and was bartering for drugs.'" Ulloa, 94 F.3d at 955.

"seabag," in exchange for drugs provided by the defendants:

> [I]n the circumstances of this case ... the government supplied the weapons and delivered them in a covered bag. If knowledge or intent of the defendants is utterly immaterial, then the government is free to put machine guns in the bag **even if they were not bargained for, and thereby add 25 more years to the penalty imposed on defendants with no additional culpability** on their part. [103 F.3d 1501, at 1506 (emphasis added).]

If the circumstances were reversed — delivery by the two defendants of two machine guns in a seabag to an undercover government agent for drugs — there would be **no** question of defendants' knowledge, and the government agent would have had no opportunity to up the ante as he did when he was furnishing the weapons — significant differences indeed!

Had the Ninth Circuit applied the rule of strict construction to the meaning of "use," it would have avoided the "draconian" penal result, as well as eliminated the real risk of government manipulation and entrapment. Indeed, as this Court stated in Harrison v. Vose, resolving "all reasonable doubts concerning [a penal statute's] meaning" in defendant's favor would guard against the injustice of "'mak[ing] every doubtful phrase a drag-net for penalties." *Id.*, 50 U.S. (9 How.) at 378. Or, as Herbert L. Packer has put it, the rule of strict construction of criminal statutes "is necessary in order to secure evenhandedness in the administration of justice and to eliminate oppressive and arbitrary exercise of official discretion." H. Packer, The Limits of the Criminal Sanction (hereinafter "Limits") 80 (Stanford Univ. Press: 1968).

II. STRICTLY CONSTRUED, THE PHRASE "ANY PERSON WHO, DURING AND IN RELATION TO ANY ... DRUG TRAFFICKING CRIME ... USES ... A FIREARM" COULD NOT APPLY TO A PERSON WHO RECEIVES A FIREARM IN EXCHANGE FOR ILLEGAL DRUGS.

In laying down the maxim that "penal laws are to be construed strictly," Chief Justice Marshall explained that "[i]t is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." Wiltberger, 18 U.S. at 95. In applying this rule of construction, the chief justice emphasized that "the **words** of the statute" are to be examined, so that "[t]he intention of the legislature [would be] collected from the **words** they employ." *Id.* at 96 (emphasis added).

In its initial effort to ascertain the reach of Section 924(c)(1)(A)'s proscription against "any defendant who 'during and in relation to [a] crime of drug trafficking uses ... a firearm,'" this Court did not apply this principle. Instead of analyzing the several words contained in the prohibition, it focused on the possible meaning of only **one word** — "use." Smith, 508 U.S. at 228-29. Indeed, as the dissenting opinion pointed out, "[t]he Court beg[an] its analysis by focusing on the word 'use' ..., and explaining that the dictionary definitions of that word are very broad." *Id.*, 508 U.S. at 241 (Scalia, J., dissenting).

Beginning, then, with the broad meaning attributed to the word "use" in a variety of contexts, the Smith Court quickly concluded that, by exchanging his firearm for drugs, the defendant had "used" it. *Id.*, 508 U.S. at 229. Having begun with the proposition that "the dictionary definitions and

experience [made] clear [that] one can use a firearm in a number of ways," the Court, in effect, shifted the burden to the defendant to show that Congress intended "use" to be construed in a more limited way. *See* Smith, 508 U.S. at 229-30. And, as the dissenting opinion contended, by isolating the word "use" at the outset from the rest of the words in the crime defined by Section 924(c)(1)(A), the Court failed to recognize that the meaning of the word "use" is "inordinately sensitive to context," with certain contexts, like Section 924(c)(1)(A), narrowing the meaning and others, like Section 924(d) — the civil forfeiture statute — broadening it. *See* Smith, 508 U.S. at 245 (Scalia, J., dissenting).

Two years later, this Court purported to change its analytic approach to the construction of Section 924(a)(1)(A), stating that "'[u]se' draws meaning from its context, and we will look not only to the word itself, but also to the statute and the sentencing scheme, to determine the meaning Congress intended." Bailey, 516 U.S. at 143. Yet, even before the Court engaged in its analysis of the statute as a whole, it had already stated its holding "that § 924(c)(1) requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Id.*, 516 U.S. at 143 (italics original). Thus, despite its statement to the contrary, the Court still focused on the meaning of the single word "use," not all of the "language of the statute." *See id.*, 516 U.S. at 144-45.

By extracting its specific holding of the meaning of "use" from the statutory text and, in the next paragraph, reaffirming the Smith rule that the barter of a gun for drugs was a "use,"[12] lower courts have seized on the phrases, "active employment"

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[12] *See* Bailey, 516 U.S. at 143.

and "operative factor," to support the conclusion that it makes no difference whether the defendant bargained drugs for a firearm or traded firearms for drugs. Either way, the firearm was either "actively employed" or an "operative factor" in relation to the drug trafficking offense. *See, e.g.*, Cotto, 456 F.3d at 28-29. *See also* Sumler, 294 F.3d at 582; Cannon, 88 F.3d at 1509; Ramirez-Rangel, 103 F.3d at 1506; Ulloa, 94 F.3d at 955.

But the statute does not criminalize the use of a firearm in the abstract. Rather, it identifies the offender as "any **person** who, **during** and in relation to any ... drug trafficking crime ... **uses** ... a firearm." 18 U.S.C. § 924(c)(1)(A) (emphasis added). The question then is not whether a firearm has been actively employed, or served as an operative factor, in effectuating a drug trafficking crime, but whether the **defendant during and in relation to** that crime actively employed (*i.e.*, used) a firearm. *Compare, e.g.*, Stewart, 246 F.3d at 731, *with* Ulloa, 94 F.3d at 955.

By dispensing with the rule of strict construction which requires that an offense be clearly "enumerated" in the text, the Bailey holding and reaffirmation of Smith have spawned extra-textual justifications for extending Section 924(c)(1)(A)'s reach to a seller who received a firearm from a buyer at the conclusion of a drug deal. For example, the Third Circuit justified its ruling that it made no difference whether the defendant had bartered drugs for a firearm or vice-versa because, in that case:

> [T]he transaction was between two private individuals and, therefore, the spectre of sentence entrapment does not lurk in the shadows. In addition, it was the defendant in this case who actively solicited the barter of drugs for guns. [Sumler, 294 F.3d at 583.]

See also Cannon, 88 F.3d at 1509.

Additionally, and even more significantly, the First Circuit explained that "the **rationale** of § 924(c) supports our interpretation" that it makes no difference whether the defendant exchanged guns for drugs or drugs for guns[13]:

> As the Court observed in Smith, "[w]hen Congress enacted the current version of § 924(c)(1), it was no doubt aware that drugs and guns are a dangerous combination...." That is so whether the defendant transfers or receives the gun. Just as the Supreme Court did not think Congress "intended courts and juries applying § 924(c)(1) to draw a fine **metaphysical** distinction between a gun's role in a drug offense as a weapon and its role as an item of barter," we do not think it intended to draw a distinction between bartering with a firearm and bartering for a firearm. [Cotto, 456 F.3d at 29-30 (emphasis added).]

Had the First Circuit honored the rule of strict construction, it could not have dismissed the lines drawn by the words employed by Congress as "metaphysical," nor divined Congress's "rationale" for the Section 924(c)(1)(A) prohibition and penalty by reference to the Smith case. After all, the Smith Court, itself, had departed from the rule of strict construction, having justified its interpretation of the meaning of "use" by reference to a 1989 report that "56 percent of all murders in New York City were drug related [and] the figure for the Nation's Capital was as high as 80 percent" to reinforce its decision that a firearm for drug transaction was proscribed by Section 924(c)(1)(A). *See* Smith, 508 U.S. at 240. By

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[13] Cotto, 456 F.3d at 29.

dispensing with the rule of strict construction, both courts ignored Chief Justice Marshall's admonition that:

> It would be dangerous, indeed, to carry the principle, that a case which is within the **reason or mischief** of a statute, is within its provisions, so far to **punish** a crime **not enumerated** in the statute, because it is of equal atrocity, or of kindred character. [Wiltberger, 18 U.S. (5 Wheat.) at 96 (emphasis added).]

Applying the rule of strict construction to Section 924(c)(1)(A) reveals that it is not enough that a firearm be found to be "actively employed" or an "operative factor" in relation to a drug trafficking offense. Rather, as the language of the section clearly states, the **"person"** who stands accused of violating Section 924(c)(1)(A) must "**during** and in relation to" the drug trafficking offense "**use** [the] firearm." In other words, it is not enough that a firearm was **"employed"** in **"relation"** to the predicate offense, but whether the **defendant used** a firearm "during and in relation to" the predicate offense. It is **defendant's action** that is denominated the crime, **not** the presence of a firearm. After all, the action brought against a person for violation of Section 924(c)(1)(A) is *in personam*, not *in rem*. It is the defendant whose liberty is at stake, not the property ownership of the firearm. Thus, contrary to Smith, the meaning of "use" of a firearm, as provided for in Section 924(d)(1) — a civil forfeiture statute — is totally irrelevant, in that it does not matter by whom the firearm was used before it is forfeited, so long as it was used by someone in violation of the named offenses.

The rule of strict construction was devised for the very purpose of protecting the liberty of individuals in criminal

cases,[14] as contrasted to their interest in things in civil proceedings. It was so designed in order to better preserve the presumption of innocence and the burden of proving criminal charges beyond a reasonable doubt. *See* Harrison v. Vose, 50 U.S. (9 How.) at 378. Under a strict construction regime, "[t]here are **no constructive offenses**; and, before one can be punished, it must be shown that his case is **plainly** within the statute," not just within its policy rationale. *See* Fasulo v. United States, 272 U.S. at 629. Further, only by applying the rule of strict construction would Section 924(c)(1)(A) give "fair warning ... in language that the common world will understand...." McBoyle v. United States, 283 U.S. at 27. Not only is it grammatically incorrect to say that a person has **used** a firearm **during** and relation to a drug trafficking offense when that person had no right of possession, much less any control, of that firearm until **after** the drug transaction was completed, it is to impose meaning obviously contrary to the "common mind."[15]

III. UNLESS 18 U.S.C. SECTION 924(c)(1)(A) IS STRICTLY CONSTRUED, THE DEFENDANT WILL HAVE BEEN CONVICTED OF AND SENTENCED FOR A CRIME NOT DEFINED BY CONGRESS

In ordinary parlance, a person who bargains for a firearm in exchange for drugs would be spoken of as a person who **received** or **accepted** the firearm as a result of the transaction, not as a person who **used** the firearms to receive or acquire them in exchange for the drugs. *See* United States v. Westmoreland, 122 F.3d at 435 ("[Defendant] received the gun.

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[14] *See* Wiltberger, 18 U.S. (5 Wheat.) at 95.

[15] *See* McBoyle, 283 U.S. at 27.

He was paid with the gun. He accepted the gun. But in no sense did he actively 'use' the gun."). *See also* United States v. Stewart, 246 F.3d at 731 ("[W]e cannot see how a defendant 'uses' a gun when he receives it during a drug transaction. The recipient has not employed the gun, availed himself of the gun, or derived any service from the gun by simply trading his drugs for it."). This characterization of the event would hold true whether or not the person who received the guns actively solicited or passively accepted the firearm in exchange for the drugs. *See* United States v. Stewart, 246 F.3d at 732.

Obtaining a firearm by bartering for that firearm with drugs would fit quite comfortably with the common understanding of "receiving" a firearm. *See* Stewart, 246 F.3d at 731-32. Significantly, the Gun Control Act, of which 18 U.S.C. Section 924(c)(1)(A) is a part, contains a number of offenses, the *actus reus* of which is "receive." *See* 18 U.S.C. §§ 922(a)(1)(A) and (B), (3), and (9); 922(g)(1)-(9); 922(h)(1) and (2); 922(j); 922(k); 922(n); 922(p); and 924(b). If it is unnatural or uncommon to construe the word "use" so as to apply Section 924(c)(1)(A) to an act commonly understood as a "receipt" of a firearm, such an application would constitute the very kind of judicial lawmaking that the rule of strict construction was designed to foreclose. *See* United States v. Halseth, 342 U.S. 277, 279-281 (1952) (statute prohibiting mail "concerning any lottery" was construed not to apply to mailing of gambling paraphernalia that may be used to set up a lottery, but only to an already existing lottery).

A careful review of the "receipt" crimes contained in the Gun Control Act reveals that Congress has addressed the issue of the conditions under which a person who receives a firearm ought to be criminalized. Yet, not one of these offenses makes it a crime to "receive" a firearm in exchange for illegal drugs. 18 U.S.C. Section 922(g)(1) does, however, prohibit such

receipt by a person who has in the **past** been convicted of an illegal drug felony offense. 18 U.S.C. Section 924(b) prohibits such receipt by a person who either (a) **intends**, by means of the received firearm, to commit such "an offense punishable by imprisonment for a term exceeding one year" in the **future**, or (b) knows or has reasonable cause to believe that the received firearm is to be so employed in the commission of a **future** offense so punishable. But neither these sections — nor any other section of the Gun Control Act — makes it a crime for a person to "receive" a firearm "during and in relation to [a] drug trafficking crime," *i.e.*, in the **present**. Only if 18 U.S.C. Section 924(c)(1)(A) is subjected to an unnatural and uncommon construction, whereby "use" is stretched to include the "receipt" of a firearm, would a receipt **contemporaneous** with receipt of drugs be made a crime for having "used" the firearm.

To be sure, there may be good reason for receipt of a firearm — whether the firearm is actively solicited or passively accepted — to be made a crime, as the First Circuit concluded in its assessment that "'drugs and guns are a dangerous combination.'" *See* Cotto, 456 F.3d at 29. But, under the rule of strict construction, such an assessment and decision is a legislative choice, not to be short-cut by a judicial fix. *See* Fasulo v. United States, 272 U.S. at 625-26, 628-29 (court rejected government's insistent claim that the phrase "scheme to defraud" should be construed to proscribe any scheme to obtain property by "dishonest means," including threats of murder or bodily harm). As Professor Herbert Packer has pointed out in his classic study of the limits of the criminal sanction:

> If criminal law can be made *a posteriori*, by judges, rather than *a priori*, by legislatures, then the enforcement officials are under strong temptation to

> guess what the judges will do in a particular case. [While] [t]his temptation cannot be eliminated, ... it can be minimized through the habits of thought acquired by enforcement officials who work under the principle of legality. [H. Packer, Limits, at 90.]

As illustrated by this case, the "temptation" for law enforcement officials to overreach in the application of 18 U.S.C. Section 924(c)(1)(A) was especially pronounced. For Mr. Watson's role in a single transaction wherein he exchanged drugs for a firearm, the prosecutor charged him with three felony counts: (1) the sale of a controlled substance, in violation of 21 U.S.C. Section 841(a)(1); (2) use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. Section 924(c)(1)(A); and (3) possession of a firearm by a convicted felon, in violation of 18 U.S.C Section 922(g)(1). *See* Petition for a Writ of Certiorari of Michael A. Watson, p. 4. As is true of so many drug offenses, this one was initiated by a government informant who, after a discussion with Mr. Watson about the latter's desire to buy a gun and the possible cash price, offered to introduce Mr. Watson to an individual willing to provide Mr. Watson with a firearm in exchange for drugs. A few days later, the informant brought an undercover government agent to provide Mr. Watson with an unloaded pistol in exchange for the drugs, thereby setting Mr. Watson up to be charged with a violation of 18 U.S.C. Section 924(c)(1)(A). *Id.*[16]

By structuring a drugs-for-firearms transaction, rather than a cash-for-firearms transaction, the law enforcement agents

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[16] In like manner, the undercover government agent in United States v. Westmoreland, 122 F.3d at 436, "testified that he purposefully introduced a gun into the [drug] transaction [in that case] for the purpose[] of setting up a conviction on the particular offense defined in section 924(c)(1)."

transformed Mr. Watson's single act from one potential felony charge to three, including the additional charge for violation of 18 U.S.C. Section 924(c)(1)(A) which, upon conviction, required a five-year minimum sentence to be served consecutively to any sentence imposed upon conviction of either of the other two charges. Not surprisingly, the government brought all three possible felony charges.

While the formal charging and sentencing process is a matter of public record, the decisions to structure the sting operation as it was and to charge the three felony counts were made outside "public scrutiny" — "in a setting of secrecy and informality,"[17] and as Professor Packer astutely observed:

> [I]t is here that we can see the real importance of the principle of legality in the criminal law today; for this principle operates primarily to control the discretion of the police and the prosecutors rather than that of judges. [H. Packer, Limits, at 88.]

One of the "devices" traditionally utilized by the courts "to ensure that the amount of discretion entrusted to those who enforce the law does not exceed tolerable limits is the doctrine requiring strict construction of penal statutes." *Id.* at 93. Had that doctrine been applied to 18 U.S.C. Section 924(c)(1)(A), Mr. Watson would not have been charged under that statute, and therefore would not be facing the lengthy sentence imposed as a result of the statutory minimum and consecutive sentence provisions.

In short, the rule of strict construction is designed to limit the kinds of discretionary decisions made by law enforcement

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[17] *See* H. Packer, Limits at 89.

officers in a case such as this. As such, it both preserves the principle of separation of powers and, more importantly, protects individual liberty,[18] "accommodat[ing] [the] competing demands of order and freedom" by serving "the single, important function of confining the criminal law to [past] conduct."[19] Without the rule of strict construction, and other similar safeguards — such as the void for vagueness doctrine — the door would be wide open for executive officials to impose a criminal sanction, not on the basis of clearly-defined past conduct, but on the basis of a generalized policy to prevent "the very dangers and risks" of "violence and death" that guns in combination with drugs create.[20]

IV. IF 18 U.S.C. SECTION 924(c) IS NOT STRICTLY CONSTRUED, IT WILL ACCELERATE THE EROSION OF STATE CRIMINAL LAW IN VIOLATION OF THE CONSTITUTIONAL PRINCIPLE OF FEDERALISM.

At first blush, the precise legal issue presented in this case — whether the unlawful sale of a controlled substance in exchange for a firearm violates 18 U.S.C. Section 924(c)(1)(A) — may seem narrow, technical and likely to affect only a few persons, most of whom are already engaged in unlawful conduct. However, this case presents this Court with

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[18] *See* Wiltberger, 18 U.S. (5 Wheat.) at 95-96, and Harrison, 50 U.S. (9 How.) at 378.

[19] H. Packer, Limits at 96. *See also* Romans 13:3-4 ("For rulers are not a terror to good **works**, but to the evil.... For he is the minister of God to thee for good. But if thou **do** that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that **doeth** evil.") (emphasis added).

[20] *See* Smith, 508 U.S. at 240.

the opportunity to return to the doctrine of the strict construction of penal statutes, which, in turn, would defend the constitutional principle of federalism, protecting the central role of states and localities in criminal law enforcement.

The U.S. Constitution hardly provides unquestioned support for the type of robust federal criminal code that has developed in recent years. Indeed, the Constitution expressly authorizes Congress to create only a handful of federal criminal offenses, such as counterfeiting (U.S. Const., Art. I, Sec. 8, cl. 5), piracy (*Id.*, Art. I, Sec. 8, cl. 9), and treason (*Id.*, Art. II, Sec. 4; Art. III, Sec. 4). A few additional categories of federal crimes can be implied from other powers, such as tax fraud (*Id.*, Art. I, Sec. 8, cl.1) and immigration fraud (*Id.*, Art. I, Sect. 8, cl. 4). Only the promiscuous use of the Commerce Clause combined with the neglect of the Tenth Amendment has enabled the federal government to occupy the field of criminal law reserved to the states.[21]

Just a dozen years ago, after decades of proliferation of federal crimes, the Supreme Court reviewed the possible constitutional bases for criminal law in Art. I, Sec. 8 and reaffirmed that the Constitution withholds from Congress "a plenary police power that would authorize enactment of every type of legislation. See Art. I, Sec. 8." United States v. Lopez, 514 U.S. 549, 566 (1995). Indeed, "[f]or much of our national history, the deeply rooted principle that the general police power resides in the states — and that federal law enforcement should be narrowly limited — was recognized in practice as well as principle." ABA Task Force on Federalization of Criminal Law, The Federalization of Criminal Law, p. 17

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[21] "Virtually all of the federal criminal legislation of the twentieth century has been based on the Commerce Clause." G. Ashdown, "Federalism and the Criminal Justice System," 98 W.Va.L.Rev. 789, 807 (Spring 1996).

(1998).

The instant case illustrates the degree to which federal criminal law has come to overlap, not supplement, state criminal law. Watson was charged with three discrete federal felonies:

- "**distribution of a Schedule II controlled substance**, in violation of 21 U.S.C. § 841(a)(1)" with a maximum penalty generally of 10 years to life imprisonment.

- "**possession of firearms by a convicted felon**, in violation of 18 U.S.C. § 922(g)(1)"[22] with a maximum penalty of five years.

- "**use of a firearm during and in relation to a drug trafficking offense**, in violation of 18 U.S.C. § 924(c)(1)(A)" with a consecutive penalty of not less than five years.

Watson's offenses easily could have been dealt with under

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[22] In 2000, the Supreme Court established that 18 U.S.C. Section 924(c)(1)(A) ("uses or carries ... during and in relation to or who in furtherance of any such crime possesses" with a penalty of "not less than 5 years"), as well as Section 924(c)(1)(B) ("short-barreled rifle, short-barreled shotgun, or semi-automatic assault weapon" with a penalty of "not less than 10 years"), established a separate substantive crime, discrete from the underlying "drug trafficking offense" or "crime of violence," and therefore must be alleged in the indictment and proved to a jury beyond a reasonable doubt. Castillo v. United States, 530 U.S. 120, 122 (2000).

Accordingly, 18 U.S.C. Section 924(c)(1) is fundamentally different than 18 U.S.C. Sections 924(c)(1)(A)(ii) ("brandishing," with a penalty of not less than 7 years) and 924(c)(1)(A)(iii) ("discharge" with a penalty of "not less than 10 years), which are sentencing factors that need not be raised until the sentencing phase. *See* Harris v. United States, 536 U.S. 545, 556 (2002).

Louisiana state law in Louisiana state courts. As to the controlled substance charge, he could have been charged with a violation of La. Rev. Stat. Section 40:967(B)(4)(b), with a penalty of being imprisoned "at hard labor for not less than two years nor more than thirty years, with the first two years of said sentence being without benefit of parole, probation, or suspension...." As to the felon in possession charge, Watson could have been charged with a violation of La. Rev. Stat. Section 14:95.1(A-B), with a penalty of being imprisoned "at hard labor for not less than ten nor more than fifteen years without the benefit of probation, parole, or suspension of sentence...." But third, the firearms "use" charge brought in the federal system would probably never have been brought, as Louisiana state law clearly requires that the offender "actually possessed" or "actually used" a firearm. La. C.Cr.P. Art. 893.3.

Of course, this examination of state law does not assist the court in interpreting the text of a federal law using different words, but it does illustrate that the people of Louisiana, acting through their elected officials, have criminalized most of the behavior that Watson engaged in, and, as a matter of routine, could have handled this prosecution.[23]

Strictly construing this and all other federal criminal statutes would remove at least a measure of the temptation for law enforcement officials to bring what are essentially state criminal charges into the federal system. Such a choice between federal and state systems is not a matter of little or no

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[23] Indeed, domestic drug trafficking is the most frequently prosecuted federal offense (over 28 percent of all federal criminal filings in FY 1997), whereas federal prosecutions for domestic drug trafficking account for less than an estimated 2 percent of all prosecutions (federal and state) in the nation. ABA Task Force on Federalization of Criminal Law, The Federalization of Criminal Law (ABA) (1998), p. 20.

import. In 1998, the American Bar Association's Task Force on the Federalization of Criminal Law published an extensive study of The Federalization of Criminal Law.[24] Of particular relevance to the erosion of state police power, the task force found:

> In the absence of a distinct federal interest, the decision to prosecute can lack a guiding federal principle. A federal prosecutor is under no legal requirement to state why any particular defendant has been selected to be prosecuted in the federal system and receive a significant federal sentence, and why the many other similar defendants are left to state prosecution. Restraint is essentially left to self-imposed prosecutorial discretion. [*Id.*, p. 33.]

Additionally, strictly construing federal statutes can lessen the temptation at the state level to "use possible federal prosecution, with its likely harsher punishments, as a threat." *Id.*, p. 34. To illustrate this threat, the ABA Task Force observed:

> A **state** drug defendant was offered a guilty plea which would have led to a 4-8 year sentence. When the defendant declined and wanted a trial, a **federal** drug prosecution was brought, leading to a mandatory life

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[24] Members of the task force represented a wide variety of views, from former Congressman and Chairman of a House Judiciary Subcommittee on the Courts, Intellectual Property, and the Administration of Justice Robert W. Kastenmeier (D-IL), to former Chief Justice of Alabama and former United States Senator and Howell Heflin (D-AL), and to former United States Attorney General Edwin Meese III (the Task Force's Chair), and Professor John S. Baker, Jr., the Dale E. Bennett Professor of Law at Louisiana State University.

sentence. [*Id.*, p. 34 (emphasis added).][25]

Writing about the abuses that can flow from an Independent Counsel, Seventh Circuit Judge Richard A. Posner makes similar important comments on the current state of the federal criminal justice system.

> The machinery of federal criminal investigation and prosecution, with its grand juries, wiretaps, DNA tests, bulldog prosecutors, pretrial detention, broad definition of conspiracy, heavy sentences (the threat of which can be and is used to turn criminals into informants against their accomplices), and army of FBI agents, is very powerful; there is a fear that fed enough time and money, **it can nail anybody**. There is some truth to this, since there are **literally thousands of federal criminal laws**, many of them **at once broad, vague, obscure**, and underenforced.... [R. Posner, An Affair of State, Harvard University Press, p. 87 (1999) (emphasis added).]

Many federal criminal laws remain "broad, vague, [and] obscure," because of the absence of a judicially-announced protective rule of strict construction assuring clarity in the criminal law.[26]

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[25] Citing Jim Smith, Petty Pusher Goes Out Big Time, *Philadelphia Daily News*, July 17, 1992, and Dennis E. Curtis, *The Effect of Federalization on the Defense Function*, 543 Annals Am. Acad. Pol. & Soc. Scl. 85 (1996).

[26] Even God did not judge before the law had been clearly declared; neither should the state. "For until the law sin was in the world: but sin is not imputed when there is no law." Romans 5:13.

CONCLUSION

The instant case — that may seem narrow, technical and likely to affect only a few persons — provides this Court with a vehicle to re-establish a first-order rule of construction to protect the legitimacy of our federal criminal justice system. For this reason and for the others stated herein, petitioner's conviction of and sentence for violation of 18 U.S.C. Section 924(c)(1)(A) should be overturned.

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IN THE

Supreme Court of the United States

MICHAEL A. WATSON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

18 U.S.C. § 924(c)(1)(A) criminalizes the "use" of a firearm during and in relation to a drug trafficking offense and imposes a mandatory consecutive sentence of at least five years' imprisonment. In *Bailey* v. *United States*, 516 U.S. 137 (1995), this Court held that "use" of a firearm under § 924(c) means "active employment." *Id.* at 144. The question presented in this case is:

Whether mere receipt of an unloaded firearm as payment for drugs constitutes "use" of the firearm during and in relation to a drug trafficking offense within the meaning of 18 U.S.C. § 924(c)(1)(A) and this Court's decision in *Bailey*.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs on various issues in this Court and other courts and has filed *amicus curiae* briefs in previous suits related to 18 U.S.C. § 924. See *Bousely* v. *United States*, 523 U.S. 614 (1998); *Bryan* v. *United States*, 524 U.S. 184 (1998); *Muscarello* v. *United States*, 524 U.S. 125 (1998).

SUMMARY OF THE ARGUMENT

In *Bailey* v. *United States*, 516 U.S. 137, 143-44 (1995), this Court recognized that a conviction under the "use" prong of 18 U.S.C. § 924(c)(1)(A) requires the government to establish that a firearm was "active[ly] employ[ed]," not "mere[ly] possess[ed]" by the defendant. This definition of "use" has remained undisturbed by subsequent congressional amendment of § 924(c)(1)(A). In addition, the common understanding of the verb *to use* is that one cannot *use* an object that one

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

does not possess or control. Thus, this Court's prior ruling in *Bailey* and the plain meaning of the word *use* establish that merely being the recipient of a firearm in exchange for drugs does not constitute "use" of a firearm "during and in relation to" a drug-trafficking offense.

Even if § 924(c)(1)(A) were not clear on its face, however, the rule of lenity dictates that any ambiguity in the term "use" must be resolved in favor of finding no criminal liability. In order to override the rule of lenity, the context and legislative history of a statute must make it unambiguously clear that the challenged conduct falls within the terms of the statute. Here, both the surrounding context of § 924(c)(1)(A) and the legislative history provide no basis for interpreting "use" to include receiving a firearm. Indeed, the statutory context and legislative history prove just the opposite. Consequently, even if the Court were to conclude that meaning of "use" in § 924(c)(1)(A) is ambiguous, this case is precisely the type of situation in which the rule of lenity was meant to apply. The Fifth Circuit's decision upholding Petitioner's conviction should be reversed.

ARGUMENT

I. THE PLAIN MEANING OF "USE" DOES NOT ENCOMPASS RECEIPT OF A FIREARM.

It is well-settled that criminal liability may be imposed under a criminal statute only for conduct that falls within the terms of the statute. See, *e.g.*, *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820). In determining what conduct is sanctioned under a criminal statute, the words of the statute "must be given [their] ordinary or natural meaning." *Bailey*, 516 U.S. at 145 (internal quotation marks omitted). Because the verb *to use* does not ordinarily or naturally incorporate the concept *to receive*, § 924(c)(1)(A) on its face does not extend to cases involving a defendant's receipt of a firearm. See 18 U.S.C. § 924(c)(1)(A) (imposing liability upon "any person

who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm").

Standard English dictionaries do not support an inference that *to receive* (or, *e.g.*, *to acquire* or *to accept*) is generally incorporated into the meaning of the verb *to use*. Webster's Dictionary lists seven transitive verb definitions of *to use*, none of which convey any sense that *to use* can ordinarily refer to the act of *receiving* a commodity or good. The definitions most apt to § 924(c)(1)(A) would be the second, "to put into action or service: have recourse to or enjoyment of," or the third, "to carry out a purpose or action by means of: make instrumental to an end or process: apply to advantage: turn to account." *Webster's Third New International Dictionary* 2523-24 (1993).[2] *To use* is thus an active verb requiring possession or control of an inanimate object, unlike the passivity of *to receive*. Similarly, of the four definitions of the noun *use* in *Black's Law Dictionary*, none suggests that *use* includes the receipt of an object in trade.[3] *Black's Law Dictionary* 1540-41 (7th ed. 1999).

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[2] The definitions of *to use* closest to the concept of taking or receiving are (1) the second subpart of the second definition ("to consume or take (as liquor or drugs) regularly") and the fourth definition ("to expend or consume by putting to use."). Because receiving a firearm does not involve the ingestion or consumption of the firearm, neither definition fits the meaning that the Government is presently ascribing to the term *use*.

[3] The first definition of *use* in *Black's Law Dictionary* is "[t]he application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional." *Id.* at 1540. The second definition is "[a] habitual or common practice <drug use>." *Id.* at 1541. The third definition is "[a] purpose or end served <the tool had several uses>." *Id.* Finally, the fourth definition is "[a] benefit or profit; esp., the right to take profits from land owned and possessed by another; the equitable ownership of land to which another person holds the legal title <cestui que use>." *Id.* The last definition (synonymous with "benefit," as in the Statutes of Uses or *cestui que use*) is a specialized term deriving from the French *oes* or *ues* and Latin *opus*, and therefore it is etymologically unrelated to the much more com-

Moreover, judicial glosses of the verb *to use* do not support stretching the word's natural meaning to incorporate the concept of receipt. This Court has noted that "use" variously means, in the context of § 924(c)(1)(A), "[t]o convert to one's service," "to employ," "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; [or] to carry out a purpose or action by means of." *United States* v. *Smith*, 508 U.S. 223, 229 (1993) (internal quotation marks omitted) (first and second alterations in original). Indeed, for more than a century, courts have held that the verb *to use* "means to employ or to derive service from." *Id.* at 228-29 (internal quotation marks omitted) (approving a reading of § 924(c)(1) that prohibits "us[ing] or employ[ing] it as an item of barter to obtain cocaine" where the petitioner "derived service from [the firearm] because it was going to bring him the very drugs he sought" (internal quotation marks omitted)).

One cannot, however, "employ or derive service from" an object that one does not control or possess. This is particularly the case when the object is controlled by and in the possession of an opposing party in a transaction. To suggest otherwise would strain the logic of this Court's ruling in *Smith*. Although the term *use* may encompass situations in which an object is employed as a *means* to an end, here the object is the end itself. One *uses* a walking cane to do something; one does not *use* the cane to *receive* the cane.

Moreover, in analyzing the language of § 924(c)(1)(A), this Court held in *Bailey* that "'use' must connote more than mere possession of a firearm by a person who commits a drug offense." 516 U.S. at 143 (internal quotation marks omitted). "These various definitions of 'use' imply action and implementation." *Id.* at 145; see *United States* v. *Montano*, 398 F.3d 1276, 1282-84 (11th Cir. 2005) (per curiam); *United*

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mon English meaning of *use* (synonymous with employ or utilize), which derives from the French *us* and Latin *usus*. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 905 (2d ed. 1995).

States v. *Mackey*, 265 F.3d 457, 462 (6th Cir. 2001); *United States* v. *Stewart*, 246 F.3d 728, 731-33 (D.C. Cir. 2001); *United States* v. *Warwick*, 167 F.3d 965, 975-76 (6th Cir. 1999); *United States* v. *Westmoreland*, 122 F.3d 431, 435-36 (7th Cir. 1997).

Receiving or *acquiring* an object conveys something *less* than "mere possession" until the process of receipt or acquisition has ended and the receiver has taken possession of the object. Receipt or acquisition of an object also cannot suggest anything *more* than "mere possession" until the receiver does something with the object (thereby triggering a new and different verb to describe the receiver's usage). Thus, to hold that "use" incorporates the meaning of *to receive* would violate *Bailey*'s admonition that "use" refers to active employment of an object and implies a sense of control and employment greater than mere possession.

In sum, the term "use" in § 924(c)(1)(A) is unambiguous because the plain and ordinary meaning of the term does not encompass the concept of receipt. Interpreting the term "use" to mean *to receive* finds no support in common English usage, does not follow from this Court's ruling in *Smith*, and would betray this Court's holding in *Bailey*. As Chief Justice Marshall warned in *Wiltberger*:

> The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves do not suggest. . . . It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

18 U.S. (5 Wheat.) at 96. Thus, criminal liability under § 924(c)(1)(A) simply cannot be imposed on the grounds that a defendant has received a firearm in exchange for drugs.

II. EVEN IF THE TERM "USE" WERE AMBIGUOUS, THE RULE OF LENITY DICTATES THAT CRIMINAL LIABILITY NOT BE IMPOSED FOR MERELY RECEIVING A FIREARM.

The rule of lenity is "almost as old as the common law itself." Antonin Scalia, The Tanner Lectures on Human Values at Princeton University, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* (Mar. 8-9, 1995).[4] Developed in the common law courts in the seventeenth and eighteenth centuries to limit the harshness of English criminal law,[5] it was adopted by this Court in 1820 in Chief Justice Marshall's oft-cited decision in *Wiltberger*. See *Wiltberger*, 18 U.S. (5 Wheat.) at 95 (the rule of lenity reflects "the tenderness of the law for the rights of individuals"). The rule was endorsed a century later by Justice Holmes in *McBoyle* v. *United States*, 283 U.S. 25 (1931), and this Court has consistently acknowledged its validity in subsequent cases. See, *e.g.*, *United States* v. *Granderson*, 511 U.S. 39, 54 (1994); *United States* v. *Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992); *Taylor* v. *United States*, 495 U.S. 575, 596 (1990); *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987), *superseded on other grounds by statute*, 18 U.S.C. § 1346, *as recognized in Cleveland* v. *United States*, 531 U.S. 12 (2000); *Dowling* v. *United States*, 473 U.S. 207, 213-14 (1985); *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 284-85

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[4] *See also Wiltberger*, 18 U.S. (5 Wheat.) at 95 ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.").

[5] *See* Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L. Rev. 748, 748-51 (1935); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L. Rev. 885, 897 (2004); William Blackstone, 1 *Commentaries* *88.

(1978); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971); *Ladner* v. *United States*, 358 U.S. 169, 177-78 (1958); *Bell* v. *United States*, 349 U.S. 81, 83 (1955); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).

A. The Rule Of Lenity Ensures That Citizens Receive Fair Warning Before Facing Penal Sanction And That The Separation Of Powers Is Preserved.

The rule of lenity is founded on "two policies that have long been part of our tradition": (i) provision of notice to the public, and (ii) separation of powers between the legislature and judiciary. *United States* v. *Bass*, 404 U.S. 336, 348 (1971). The notice requirement reflects an understanding that:

> "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

Id. (quoting *McBoyle*, 283 U.S. at 27); see *Dunn* v. *United States*, 442 U.S. 100, 112 (1979) ("[The rule of lenity] reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."). While courts in some cases have accepted as a fiction the view that knowledge of criminal statutes may be imputed to the public, see, *e.g.*, *McBoyle*, 283 U.S. at 27, this Court has observed that "in the case of gun acquisition and possession it is not unreasonable to imagine a citizen attempting to steer a careful course between violation of the statute and lawful conduct." *Bass*, 404 U.S. at 348 n.15 (internal quotation marks and parentheses omitted). The need for "fair warning" is also especially acute in the context of criminal statutes like § 924(c)(1)(A) that mandate the imposition of severe penal sanctions.

Further, the rule of lenity serves as a key mechanism in preserving the separation of powers between the legislative and judicial branches. As this Court has recognized, it is the exclusive province of the legislature to proscribe conduct as criminal. Chief Justice Marshall stressed this point in *Wiltberger*, citing "the plain principle that the power of punishment is vested in the legislative, not in the judicial department" and affirming that "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. (5 Wheat.) at 95. The Court again elaborated upon this principle in *Bass*:

> [B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should."

404 U.S. at 348 (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks 196, 209 (1967)). Thus, before an individual can be condemned to a multi-year prison sentence for taking a certain action in relation to a firearm, it must be clear that Congress defined that specific action as criminal.

B. The Rule Of Lenity Should Apply Because The Term "Use" In § 924(c)(1)(A) Does Not Unambiguously Include Receipt.

1. Reasonable Doubt Exists As To Whether The Statute's Plain Language Means *To Receive*.

Before a criminal defendant may be subjected to penal sanction, a court must first conclude that the statute unambiguously makes the defendant's conduct criminal. If there is a reasonable doubt as to the clarity of the statute, the rule of lenity applies. See *Scheidler* v. *National Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) ("'When there are two rational

readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.'") (alteration omitted) (quoting *McNally*, 483 U.S. at 359-60).

As this Court's decision in *Wiltberger* demonstrates, criminal liability will not be imposed for conduct that does not fall within the ordinary meaning of the statute's terms, even when other factors arguably weigh in favor of liability. In *Wiltberger*, the Court considered whether Congress's prohibition of manslaughter "on the high seas" applied to the defendant's commission of the offense on a river in China. See 18 U.S. (5 Wheat.) at 77. The Court noted that it could "conceive no reason" why the defendant's conduct should not be subject to criminal liability, and found it "extremely improbable" that Congress actually intended to exclude such conduct from punishment under the statute. *Id.* at 105. Nonetheless, the Court concluded that the ordinary meaning of the term "high seas" simply did not include foreign rivers, and that it could not "enlarge" the statute so as to encompass the defendant's actions. *Id.* Accordingly, the Court applied the rule of lenity and held that the criminal charge was not legally cognizable.

This Court has also emphasized that criminal liability should not be imposed based on even a plausible textual interpretation that reaches beyond the plain, ordinary meaning of the criminal statute. In *McBoyle*, the Court considered whether a defendant who had transported a stolen airplane could be convicted under a statute prohibiting theft of a "motor vehicle," which was defined to include any "self-propelled vehicle not designed for running on rails." 283 U.S. at 25-26. The Court found that while it was "etymologically" plausible to interpret the statutory term as including airplanes, the more ordinary reading would limit the term to land-based vehicles. *Id.* at 26-27. Thus, the Court reversed the defendant's conviction. *Id.* at 27; see *Scheidler*, 537 U.S. at 403 n.8 ("Surely if the rule of lenity . . . means anything, it means that the famil-

iar meaning of the word . . . should be preferred to the vague and obscure . . . .").

Indeed, this Court has recognized that even a limited degree of textual ambiguity will call for application of the rule of lenity. In *Universal C.I.T. Credit Corp.*, 344 U.S. at 221-22, *Ladner*, 358 U.S. at 177-78, and *McNally*, 483 U.S. at 359-60, the Court stated that the rule of lenity applies unless the statutory language at issue is "clear and definite." See *Bass*, 404 U.S. at 348-49 (lenity is appropriate unless the statute "'plainly and unmistakably'" covers the defendant's conduct) (quoting *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917)). Even in *Smith*, the Court declined to apply the rule of lenity only after finding that the government's interpretation of the relevant statute was "squarely within common usage and dictionary definitions." 508 U.S. at 240.

As explained above in Part I, *supra*, § 924(c)(1)(A) unambiguously does not impose liability for receipt of a firearm because the plain, ordinary meaning of the term "use" does not encompass the concept of receipt. But even if the term "use" were ambiguous, the rule of lenity would still prohibit the imposition of criminal liability because § 924(c)(1)(A) does not make clear, plain, definite, and unmistakable that receipt of a firearm qualifies as "use."

2. The Context Of § 924(c)(1)(A) Does Not Support A Clear And Unambiguous Inference That "Use" Incorporates *To Receive*.

Not only does the plain meaning of the word *use* fail to include receipt, § 924(c)'s broader context also does not reveal any clear and unambiguous Congressional intent to incorporate *to receive* into the meaning of "use". In fact, reading the statute within its framework further demonstrates that "use" clearly does not incorporate the meaning of *to receive*. See *Smith*, 508 U.S. at 229 ("Language, of course, cannot be interpreted apart from context.").

First, construing the term "use" to include receipt of a firearm is at odds with Congress' post-*Bailey* amendment of § 924(c)(1)(A). After this Court held in *Bailey* that the term "use" in § 924(c)(1) has a narrower meaning than mere possession, Congress amended § 924(c)(1)(A) to provide that:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, *or* who, in furtherance of any such crime, possess a firearm, shall [be punished] . . . .

18 U.S.C. § 924(c)(1)(A) (emphasis added). Thus, Congress did not amend or otherwise alter the definition of the term "use," but rather created a separate possession offense, separated from the original "use" offense by the disjunctive "or." See *United States* v. *Combs*, 369 F.3d 925, 930-33 (6th Cir. 2004).

The new "possession" offense of § 924(c)(1) has two elements (*i.e.*, (1) "possess[ion]" of a firearm (2) "in furtherance of" a covered crime) that track the original "use" offense's elements (*i.e.*, (1) "use" of a firearm (2) "during and in relation to" a covered crime). The quantum of proof required to establish a "use" offense is higher than a mere possession offense. See *Bailey*, 516 U.S. at 143 (holding that "'use' must connote more than mere possession"); cf. *Muscarello*, 524 U.S. at 126-27 (holding that "carrying" requires a firearm to be on or accompanying the person); *Hilliard* v. *United States*, 157 F.3d 444, 449 (6th Cir. 1998) (holding "the proper inquiry [in determining whether a firearm is "carried"] is physical transportation").

Because it is ordinarily less difficult to establish possession than use, the "possession" offense's "in furtherance of" element requires a higher proof than the "use" offense's "during and in relation to" element. *Combs*, 369 F.3d at 932-33 (holding that "in furtherance of" element differs from "during and in relation to," "and requires the government to prove a defendant used the firearm with greater participation in the

commission of the crime"); *United States* v. *Iiland*, 254 F.3d 1264, 1274 (10th Cir. 2001) (same). See also 144 Cong. Rec. S12760, S12671 (daily ed. Oct. 16, 1998) (statement of Sen. DeWine) ("I believe that the 'in furtherance' language is a slightly higher standard that encompasses 'during and in relation to' language, by requiring an indication of helping forward, promote, or advance a crime."); *Violent and Drug Trafficking Crimes: The Bailey Decision's Effect on Prosecutions Under Section 924(c) Before the Senate Comm. on the Judiciary*, 104th Cong. 24-27 (1996) (statement of Thomas G. Hungar).

Taken together, the "use" and "possession" offenses are now delicately balanced, each containing an element more difficult to prove in conjunction with one that is less demanding. But the nature of the balance reveals that Congress never intended "use" to include mere receipt of a firearm. Including bartering for the receipt of a firearm within the definition of "use" would lower the threshold for establishing "use" even below the threshold for establishing "possession," while keeping fixed the "during and relation to" element. See, *e.g.*, *Montano*, 398 F.3d at 1284 (noting that the "firearms were never in Montano's possession, either actually or constructively" where defendant was charged with "use" offense for having received firearms in narcotics-for-gun barter). There is simply no "clear and definite" indication that Congress intended to upset this careful balance, particularly when such harsh penal sanctions are at stake.

Furthermore, other provisions of § 924 demonstrate that it is not appropriate to infer that "use" includes *receiving* a firearm simply because *tendering* a firearm may constitute "use" under *Smith*. For instance, in 18 U.S.C. § 924(b) ("Whoever . . . ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce . . . ."), Congress prohibited the shipment, transportation, and receipt of fire-

arms under certain conditions.[6] The separation of the three verbs by the disjunctive "or" indicates that Congress believed that the terms "ships," "transports," and "receives" reflect three different concepts. See *Bailey*, 516 U.S. at 145 ("Judges should hesitate . . . to treat as surplusage statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense.") (internal quotation marks and brackets omitted, omission in original) (quoting *Ratzlaf* v. *United States*, 510 U.S. 135, 140-41 (1994)); cf. *id.* at 146 (courts should "assume that Congress used [three] terms because it intended each term to have a particular, nonsuperfluous meaning"). Thus, just as shipping a firearm is different from receiving a firearm, so too is furnishing a firearm different from receiving a firearm.

In sum, the statutory context of § 924(c)(1)(A) provides no basis for concluding that the term "use" unambiguously includes being the recipient of a firearm. The post-*Bailey* amendments to § 924(c)(1)(A) and the presence of the term "receive" elsewhere in § 924 both suggest that it would be unreasonable to construe "use" as including receipt of a firearm, and hence the rule of lenity is particularly appropriate here.

3. Section 924(c)'s Legislative History Does Not Unambiguously Reveal Congressional Intent For "Use" To Encompass Receipt.

Resort to legislative history will ordinarily not suffice to overcome the rule of lenity. See *Crandon* v. *United States*, 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted

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[6] Similarly, Congress distinguished the verb *to acquire* from the verb *to transfer* in § 924(g), which prohibits anyone intending to commit certain offenses from traveling abroad to "acquire or transfer" a firearm "in furtherance of such purpose." 18 U.S.C. § 924(g).

by the text."). Setting aside the question of whether it is even appropriate to consider legislative history when the text of a criminal statute is ambiguous,[7] legislative history cannot override the rule of lenity unless the legislative history leaves no "reasonable doubt" regarding the statute's meaning. See *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992) (plurality); *Moskal* v. *United States*, 483 U.S. 103, 108 (1990); *Wiltberger*, 18 U.S. (5 Wheat.) at 96 ("The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves do not suggest. . . ."); cf. *Ladner*, 358 U.S. at 177-78 (stating that legislative history must point "clearly" to a certain meaning before rule of lenity is abandoned).

Moreover, this Court has made clear that it will not construe ambiguous statutory text against a criminal defendant based on the assumption that Congress, as a matter of policy, would have meant to outlaw the defendant's conduct. See *R.L.C.*, 503 U.S. at 306 n.6 (plurality) (Congress's "'general declarations of policy'" could not support reading an ambiguous criminal statute against the defendant) (quoting *Hughey* v. *United States*, 495 U.S. 411, 422 (1990)); *Wiltberger*, 18 U.S. (5 Wheat.) at 96 ("It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.");

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[7] Although the Court has previously referred to legislative history in determining whether a statute was ambiguous enough for lenity to apply, see *United States* v. *R.L.C.*, 503 U.S. 291, 298-306 (1992) (plurality); *Moskal* v. *United States*, 498 U.S. 103, 108, 111-12 (1990), this practice has given rise to substantial disagreement. See *R.L.C.*, 503 U.S. at 307-10 (Scalia, J., concurring); *id.* at 311 (Thomas, J., concurring). Indeed, the plurality in *R.L.C.* agreed that it would be the "'rare'" occasion when legislative history could "'support a construction of a statute broader than that clearly warranted by the text.'" *Id.* at 306 n.6 (quoting *Crandon*, 494 U.S. at 160).

McBoyle, 283 U.S. at 27 (refusing to adopt an expansive reading of a statutory term "upon the speculation that, if the legislature had though of it, very likely broader words would have been used."); see also *Moskal*, 498 U.S. at 132 (Scalia, J., dissenting) ("The temptation to stretch the law to fit the evil is a ancient one, and it must be resisted.")

Here, the legislative history of § 924(c)(1)(A) provides no basis for concluding that Congress intended to incorporate the meaning of *to receive* into the term "use." The legislative history indicates that the term "use" remains limited and only applies when a firearm is actively employed. Moreover, construing the term "use" to include receipt of a firearm has in fact undermines Congress' goal of reducing the threat posed by the combination of drugs and firearms.

First, the legislative history of the post-*Bailey* amendment of § 924(c)(1)(A) suggests that Congress intended the term "use" to remain narrowly construed. In *Bailey*, the Court held that the term "use" reflects an "active-employment understanding." *Bailey*, 516 U.S. at 148. The Court noted that the verb *to use* "takes on different meanings depending on context" but rejected the verb's "inactive function," holding that "the inert presence of a firearm, without more, is not enough to trigger § 924(c)(1)." *Id.* at 148-49.

The Senate and House each entertained separate bills in 1996 in response to the ruling in *Bailey*. The Senate bill, S. 1612, 104th Cong. §1 (1996), simply substituted "possesses" for "uses or carries." The House Bill, H.R. 125, 104th Cong. § 5 (1996) made the same replacement while also setting up a different scheme respecting the nexus between the firearm and the predicate offense: "a person who, during and in relation to [a predicate offense] . . . possesses a firearm . . . ." Neither bill was enacted.

Congress again proposed amendments to § 924(c) the following year. The 1997 Senate bill only added "possesses" to the list of prohibited acts ("any person who, during and in re-

lation to [a predicate offense] . . . *uses, carries or possesses* a firearm"). S. 191, 105th Cong. § 1 (1997). The House Bill, on the other hand, simply repeated the language of the failed 1996 bill. H.R. 424, 105th Cong. § 1 (1997). Neither the 1996 nor 1997 bills directly addressed or specifically sought to redefine the term "use."

Congress ultimately enacted the amended § 924(c) in 1998. This amendment added the "possession" offense (proscribing "possession of a firearm . . . in furtherance of" a predicate offense), which provides for a lower burden of proof with respect to a defendant's control of the firearm ("possession" instead of "use") while raising the burden with respect to the firearm's nexus with the predicate offense ("in furtherance of" instead of "during and in relation to"). See *Combs*, 369 F.3d at 932-33; *Mackey*, 265 F.3d at 460-61.

Thus, the amendment of § 924(c)(1)(A) after *Bailey* did not alter the "use" offense at all, and *Bailey*'s interpretation of the term "use" was not affected. The legislative history of § 924(c)(1)(A) indicates no intent to expand the meaning of "use" beyond *Bailey*'s active-employment sense, nor does it reflect any intent to import the concept of receipt into the term "use." In fact, Congress thrice *rejected* attempts to broaden the scope of § 924(c) by replacing "use" with "possess," while maintaining the lower "during and in relation to" standard. Cf. *Dixon* v. *United States*, 126 S. Ct. 2437, 2447 (2006) (Congress' failure to use the language and structure of the Model Penal Code in the Safe Streets Act provides evidence that Congress intended a different burden-of-proof standard than provided in the Code). As such, there is no clear evidence that Congress intended to include receipt of firearms within the scope of the term "use," and hence the legislative history of § 924(c)(1)(A) provides no grounds for disregarding the rule of lenity in this case.

In fact, construing the term "use" to include receipt of firearms could undermine the very policies motivating Congress' enactment of § 924(c)(1)(A). The "basic purpose" of

§ 924(c) is "to combat the 'dangerous combination' of 'drugs and guns.'" *Muscarello*, 524 U.S. at 132 (quoting *Smith*, 508 U.S. at 240). Yet because a conviction under § 924(c) guarantees a mandatory minimum sentence, § 924(c) provides government agents in sting operations considerable incentives to introduce firearms into drug transactions. Government agents in sting operations have admitted that they have intentionally structured transactions so as to involve both firearms and drugs in order to increase a defendant's sentence under § 924(c). See *Westmoreland*, 122 F.3d at 436 (explaining that the government agent "testified that he purposefully introduced the gun into the transaction for the purposes of setting up a conviction on the particular offense defined in section 924(c)(1)"); see also *United States* v. *Cannon*, 88 F.3d 1495, 1507 n.3 (8th Cir. 1996) (noting the court "recently reiterated [its] discomfort with reverse-sting operations, which have great potential for abuse" and urging courts to conduct "the most careful scrutiny and probing examination"). Such an application of § 924(c)(1)(A) cannot be squared with the statute's fundamental purpose of "'persuad[ing] the man who is tempted to commit a Federal felony to leave his gun at home.'" *Muscarello*, 524 U.S. at 132 (quoting Rep. Poff, § 924(c)'s chief legislative sponsor).

These concerns are not merely academic. Reported cases from across the country demonstrate that government agents routinely introduce firearms or drugs into a transaction that otherwise would not have involved this "dangerous combination." See, *e.g.*, *United States* v. *Cotto*, 456 F.3d 25, 26-27 (1st Cir. 2006) (confidential informant told the defendant that she would only accept drugs as payment for firearms), *petition for cert. filed*, No. 06-8168 (U.S. Dec. 5, 2006); *Warwick*, 167 F.3d at 975-76 (affirming dismissal of § 924(c)(1)(A) charge where an undercover officer insisted at the last minute that the defendant accept a firearm as partial payment for drugs); *Westmoreland*, 122 F.3d at 436; *United States* v. *Zuniga*, 18 F.3d 1254, 1256 (5th Cir. 1994) (under-

cover agent contacted defendant and proposed sale of firearms in exchange for heroin); *United States* v. *Fabian*, No. 2:04-CR-71-01, 2005 WL 2043008, at *1, 5-6 (D. Vt. Aug. 23, 2005) (describing claim that government agents insisted that the defendant accept firearms as payment for drugs); *United States* v. *Carreiro*, 14 F. Supp. 2d 196, 200 (D.R.I. 1998) (acquitting the defendant of a § 924(c)(1)(A) offense where undercover agents demanded that the defendant pay for a firearm with drugs, since "Carreiro had no intention of including drugs in the transaction until government agents insisted that it was part of the deal"); *United States* v. *Cannon*, 886 F. Supp. 705, 706 (D.N.D. 1995) (noting that defendants purchased a machinegun in exchange for crack cocaine after "some salesmanship by the officer and agent"), *rev'd*, 88 F.3d 1495 (8th Cir. 1996). See also *United States* v. *Ramirez-Rangel*, 103 F.3d 1501, 1507 (9th Cir. 1997) (noting that agents in drugs-and-guns transaction may have provided machine guns in lieu of other firearms without defendant's knowledge in order to increase § 924(c) sentence). In this very case, it was the government's confidential informant, not the Petitioner, who insisted that the firearm be purchased with narcotics rather than cash. *United States* v. *Watson*, No. 05-31094, 191 Fed. App'x 326, 327 (5th Cir. 2006) (per curiam).

Congress' plain intent in carefully balancing "use" and "possession" in § 924(c) and requiring additional proof that a firearm facilitated the drug transaction, and the additional policy reasons for rejecting Respondent's expansion of the scope of 924(c)(1) demonstrate that that there is no clear and unambiguous indication by Congress that "use" should include receiving a firearm. As a result, there is simply no basis for disregarding the rule of lenity in this case. See *Granderson*, 511 U.S. at 54 ("In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."). Section 924(c)(1)'s "use" provision cannot be construed to en-

compass receiving a firearm, and thus Petitioner's conviction under § 924(c)(1) should be reversed.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be reversed.

Respectfully submitted,

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May 4, 2007

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IN THE SUPREME COURT OF THE UNITED STATES

- x

MICHAEL A. WATSON, :

Petitioner :

v. : No. 06-571

UNITED STATES :

- x

Washington, D.C.

Tuesday, October 9, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10: 05 a.m.

APPEARANCES:

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DEANNE E. MAYNARD, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 06-571, Watson v. United States.

Mr. Koch.

ORAL ARGUMENT OF KARL J. KOCH

ON BEHALF OF THE PETITIONER

MR. KOCH: Mr. Chief Justice, and may it please the Court:

Mr. Watson's receipt of a firearm in exchange for drugs does not constitute the use of that firearm as the word "use" is employed by 18 U.S.C. Section 924(c)(1) for two principal reasons. First, applying the plain and ordinary meaning of the word "use," the receipt of a thing is not the use of that thing. There is no grammatically proper way to say that someone uses a firearm when all that person does is receive it.

Second, treating receipt as use under the statute conflicts with this Court's decision in Bailey v. United States, which held that use requires active employment. And I'll address those two points in turn.

JUSTICE GINSBURG: Would you address first whether receipt of the gun constitutes possession of the

gun?

MR. KOCH: Yes, ma'am. I believe receipt does constitute possession. However, of course, possession standing alone under this Court's decision in Bailey does not constitute use.

JUSTICE GINSBURG: But under the statute as amended, possession is also indictable.

MR. KOCH: Possession in furtherance of the offense is -- is -- would be indictable. That -- that was not charged in this particular case. And I would suggest that the -- that the circumstances of this case might not call that into -- into play simply because his possession really was -- was incidental, and it was following the conclusion of the drug transaction.

So I think -- I question whether the possession in furtherance would necessarily apply here. Of course, it was not charged.

CHIEF JUSTICE ROBERTS: Well, I'm not sure. I have the same question as Justice Ginsburg. It seems to me, absent some precedents which narrows this definition, that that would have been the way to charge your client. That's not what was charged; that's not the indictment; that's not what you're arguing. So I guess the question is more appropriate for the government.

But, if, following Justice Ginsburg's question, this covers it, and it seems to me that it does, then we're not arguing about very much.

MR. KOCH: I understand, Your Honor. My only point, again, would be, that recognizing that "in furtherance," at least by the authors of that language, would suggest it to mean something more than "in relation to,." I think the question could legitimately be asked in a -- in a transaction like this, where the possession basically is what he was attempting to achieve and did, in fact, achieve, but after the -- at the end transaction.

I don't -- I can't answer whether or not, ultimately, that would be -- deemed to be in furtherance or not.

CHIEF JUSTICE ROBERTS: Mr. Koch, let's say that the parties to the transaction are concerned about avoiding exposure under the money-laundering statute, and so they got together and said: All right, we are going to have this deal. What can we use besides money? And they say: Well, let's use guns, or let's use a gun. And the seller of the drugs says: Okay. I'm willing to use that.

Isn't he using the gun in furtherance of the transaction?

MR. KOCH: I don't believe that the -- that, given what the -- what this Court has said in Bailey, that that would constitute active employment still. The --

CHIEF JUSTICE ROBERTS: It's being actively employed as the consideration in the sale.

MR. KOCH: However, the -- from the standpoint --

CHIEF JUSTICE ROBERTS: It's not being shot, but it's still being employed.

MR. KOCH: Yes, sir. From the standpoint of the -- of the seller -- from the standpoint of the drug seller, who's ultimately still doing nothing more with respect to the gun, I think the focus has to be on what are his activities? He hasn't even come into possession of it in the example that Your Honor has given.

CHIEF JUSTICE ROBERTS: But I think it would be a natural, grammatical construction to say he's willing to use the gun for the consideration.

MR. KOCH: Your Honor, I'm not certain that we would -- that we -- that it could be held in the absence even there of even possession -- whether or not that would be enough to constitute the use. That would be the first question that would occur to me. The -- certainly grammatically, and dealing, of course, with

the facts of this case, grammatically the question on the table is: When interpreting 18 U.S.C. Section 924(c)(1) giving it, as this Court held in Smith, its plain and ordinary meaning, the example that was used by the D.C. Circuit in United States v. Stewart, I thought, was appropriate, where -- the coffee shop example, where you have the -- the individual buying the coffee, and you have the cashier.

The -- the customer doesn't -- the customer comes in and pays with the dollar. The cashier accepts the dollar, but the cafeteria isn't using the dollar by receiving it as payment. It's just receiving it. Likewise, the customer isn't using the coffee through the act of receiving it. He's getting it.

JUSTICE ALITO: Well, if we look at this transaction, a guns-for-drugs transaction, is there -- can you think of any good reason why Congress would want to prescribe a 5-year penalty for the person who hands over the gun, but not any penalty for the person who receives the gun and hands over the drugs?

MR. KOCH: I do think that there are distinctions between the two conducts, sir. First of all, certainly the person that -- that has the gun and is bringing it into that transaction I would suggest, as a practical matter presents a different type of risk.

He's got the gun. He's in control of it. He's going to decide when and if to hand it over and in what condition it would be when he hands it over, or not to hand it over at all. So that the --

JUSTICE ALITO: And so that the -- the risk is Congress was worried that somebody would go to a transaction like this with a gun originally intending to trade it for drugs and then when one person gets there, a person decides to shoot somebody with the gun?

MR. KOCK: I think --

JUSTICE ALITO: And that's why they would penalize one side of this transaction and not the other?

MR. KOCH: Well, assuming of course it would -- in Smith the Court held that that is a use within the term of the statute. I think that the -- looking at -- this does not do violence to this Court's decision in Bailey. There still has to be some active employment. The person on the drug end of the transaction is -- really has nothing to do with the gun, doesn't even possess the gun, which -- before the other party decides to hand it over.

JUSTICE GINSBURG: In Smith, the Court said that the reason that selling the gun in exchange for drugs -- what was dangerous about that was the potential for instantly converting the gun from currency to a

cannon. But here isn't that even all the more of concern because one who receives the gun can instantly turn it around and shoot the drug seller?

MR. KOCH: He could if the gun was handed over in a condition -- first of all, there -- were there bullets or not? That's going to be up to, at the first instance, whether he brings them or not, the gun seller. The gun seller can decide whether to hand it over --

JUSTICE GINSBURG: But it's the same on both sides. It seems to me in both cases there is a risk of using the gun. The one who comes in with the gun can use it; the one who receives the gun can use it.

MR. KOCH: I will -- I will grant Your Honor there's obviously risk presented by the presence of the gun potentially by either party. I would suggest that, as between the two parties, the fellow that shows up with the gun who's going to decide when and if to hand it over and in what condition, cocked, uncocked, loaded or unloaded, et cetera, is in somewhat more control.

All that being said, one still gets back to the central point, which is, regardless of Congress's purpose or desires here, they still chose words that had fairly common meanings, in this case "use." And very -- it's grammatically impossible, I'd suggest, in the straightforward transaction and trade situation to

suggest that the guy that's receiving the gun is using it by receiving it, any more than the cashier is using the dollar that I pay for the cup of coffee with.

JUSTICE ALITO: If the person who hands over the gun is not a government agent or informant, is there any doubt that the person who hands over the drugs can be charged with using the -- the gun under 18 U.S.C. Section 2(b)? He causes -- the person who hands over the gun, to do something that is a crime.

MR. KOCH: I do think that there -- that's an issue that's been raised. I -- I question whether, when the underlying offense itself is the transaction and these are the only two parties, whether or not aiding and abetting liability would be intended to extend that far, any more than it would be, for example, to a drug purchaser being charged with aiding and abetting the distribution of drugs.

Certainly, given the severe penalties involved, I -- I'm a little uncomfortable with that being a usage of that statute or usage of the aiding and abetting statute. I also would point out that the overwhelming majority of these cases do involve police informants, practically all of them.

JUSTICE ALITO: Well, you're relying on the language of 924. If you look at the language of 2(b),

is there any doubt that this situation would fall squarely under it? "Whoever willfully causes an act to be done which if directly performed by him would be an offense against the United States is punishable as a principal."

MR. KOCH: That is what that statute says, sir. There is some jurisprudence, and I'm -- it may be older in nature -- that deals with two parties to a transaction and whether or not aiding and abetting liability can be used, again going back to my drug purchaser situation. And I question whether or not the -- the aiding and abetting statute can be used. It would basically, in the drug context, read out the possession statute. Every drug buyer could be charged with distribution as a principal under Section 2. The -- again, of course that's not charged here, and I've not -- I've not seen cases where that has been charged.

CHIEF JUSTICE ROBERTS: Subsection (b) is not charged in the indictment?

MR. KOCH: 18 U.S.C. Section 2 was what I understood the question to be, Judge. I apologize.

CHIEF JUSTICE ROBERTS: No. But that was not charged in the indictment?

MR. KOCH: No, sir.

CHIEF JUSTICE ROBERTS: Section 2(b)?

MR. KOCH: It was not.

Now, the -- the government's brief concedes it would not be natural to say that the customer in my example with the coffee used the coffee. Unless we're prepared to discard that standard usage of words and sacrifice it for the purpose that we believe Congress intended, then I think that the analysis really does stop there if one's reading the language of the statute and applying it.

JUSTICE GINSBURG: Mr. Koch, but the government answers that, a dollar for coffee, by saying it depends what question you ask. So if you ask was the coffee part of a beverage transaction, the answer would be of course yes.

MR. KOCH: One of the problems --

JUSTICE GINSBURG: This is a gun transaction.

MR. KOCH: Yes, ma'am. One of the problems I think that that raises that I see in different contexts with this is the different ways that the word "use" is used in an active or passive context. One might see two people to that transaction and ask, is a dollar being used in that transaction? And I think that we would all fairly say yes. But the focus in 924(c) is on that defendant: Did he use it? Just in the coffee

shop example, did the cashier use the dollar? Or in my example, did Mr. Watson use the firearm? And I think that that's -- that's the question that needs to be asked and when that question is asked in that format, then the answer I suggest is no.

JUSTICE GINSBURG: I don't remember whether you ask in your brief as an alternative argument for the overruling of Smith.

MR. KOCH: I did not raise that in the briefs, no, ma'am.

With regards to Bailey, which I think answers to a great extent some of the questions presented here, Bailey of course held that 924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant. Mr. Watson here did not actively employ the firearm. Bailey narrowed the category of uses that fell within the statute. To quote Bailey, it said "It's undeniable the active employment reading of use restricts the scope of 924(c)(1)." That's the jewel of that case. Bailey held that use requires active employment, not only in general but by the defendant.

More importantly perhaps to this case, Bailey held that possession alone is not use, and here Mr. Watson was trying to achieve possession, but -- and

ultimately when he did get possession, he had it instantaneously. So looking at it from a temporal standpoint, first he receives the gun. Before that point he doesn't have possession, so he doesn't even rise to the level of Bailey. After that point, all he did was possess it for an instant, still not enough, I'd suggest, to qualify as active employment or use under Bailey, the most recent definition that we have available.

There's an argument presented by the government that feeds off of Smith's use of 924(d) which I wanted to mention briefly. The -- and that is the -- the importation of the definition of the term "use" from 924(d), the forfeiture provision of the statute, into 924(c).

In Smith, the Court held that there were predicate offenses for 924(d) in which the only way that the weapon could be used was in a non-weapon use, which is what the Court was concerned about in the Smith case, and therefore the Court found, looking at those predicate offenses that had non-weapon uses only, that therefore the term "use" as it's employed in 924(d) must include non-weapon use. That logic, however -- and that's the argument made by the government -- that doesn't translate into the situation we have here. It's

addressed, by the way, on page 9 of our reply brief in some detail. I'll talk about it briefly.

First of all, 924(d) is a forfeiture provision and the focus there necessarily is on the firearm, not on the defendant. The language in 924(d) is, quote, "any firearm or ammunition intended to be used in one of the predicate offenses." That's compared with 924(c), which states "any person who during and in relation to a drug trafficking crime uses or carries a firearm."

So you have firearm intended to be used on the one hand, versus a person who uses a firearm. One might say perhaps that in this transaction a firearm was used, but not -- that's a different thing from saying that Mr. Watson used the firearm. It's a passive versus active formulation.

JUSTICE GINSBURG: It has to be used by somebody, some human, and the human in this case is Mr. Watson.

MR. KOCH: Well, ma'am, I think under Smith the human that's using the firearm in the transaction is actually the person that came with the firearm to use it to purchase drugs. And as -- as Smith said that that was definitely a use, it wasn't even really contested in Smith. And so I -- and I'm not contesting for this case

obviously that that person that showed up with the gun is using the gun to get drugs.

JUSTICE SCALIA: Excuse me. It wasn't contested in Smith?

MR. KOCH: I beg your pardon, Judge. I meant that the Court, in its holding -- I recognize that it was contested. In its holding, the Court said that it tended to focus more on the question of whether or not a nonweapon use would -- would be required. But the -- certainly as between the two parties in this transaction, the guy that shows up with the gun trying to use it to get drugs is certainly making use of it in a way that, that recipient is not.

The -- in, in Smith, the Court reached the opinion it did about the meaning of the term "use" only because there were, there were predicate offenses in which the only uses available were nonweapons uses. By contrast, here the predicate offenses that are suggested to import this definition of "use," there aren't any predicate offenses in which the only way to commit the offense is through receipt.

I'll grant you that there are predicate offenses in which receipt is one of the ways in which the offense can be committed, but it's not the only way. And so that logical step can't be made, as it arguably

could have been in Smith.

And finally, unlike the situation in Smith, here we know that the predicate offenses can't be interpreted --

JUSTICE SCALIA: Excuse me. Go back over that.

MR. KOCH: Yes, sir.

JUSTICE SCALIA: Why couldn't it have been said in Smith that -- that trading it for drugs was not the only way in which the offense could have been committed? Couldn't the same thing have been said in Smith?

MR. KOCH: In Smith the argument, as I took it from the opinion, Justice, was that the -- when one looked at, at the predicates, there were several which had, according to the opinion, only nonweapon uses. So if, if it's used or intended to be used in committing one of those offenses and one looks at those offenses and there's only nonweapon uses, then so the argument goes, that means nonweapon uses are part of use.

JUSTICE SCALIA: So the issue in Smith was weapon versus nonweapon, and that's not what you're arguing here?

MR. KOCH: That's correct, sir.

JUSTICE SCALIA: The issue here is use

versus nonuse, active employment versus passive receipt?

MR. KOCH: Yes, sir.

JUSTICE SOUTER: Why isn't it -- why isn't your argument more directly that the issue here is -- is nonweapon use by A versus nonweapon use by B? You represent B and you say B wasn't the one who used it in a nonweapon sense?

MR. KOCH: I agree that certainly Mr. Watson didn't use it in any weapons sense. So if there is a use at all, it would be in a nonweapon sense.

JUSTICE SOUTER: And if you are right, that's the end of the case.

MR. KOCH: I understand, Your Honor. I understand what you're saying. I believe you're right. That is another way. It's not -- it's not the direction that we went, but that makes sense.

The -- what we focused on was use or not at the first instance. And Smith having decided that in that case use and defining it broadly to include a nonweapon use here, we're getting to the point where there's no use at all in the first place.

JUSTICE SOUTER: But you're not -- as you said before, you're not arguing for the overruling of Smith, and therefore, you concede that the other party to the transaction used the gun.

MR. KOCH: Yes, sir.

JUSTICE SOUTER: In a nonweapon sense.

MR. KOCH: Yes, sir.

JUSTICE SCALIA: I think you are making his argument. I think you're -- you're too humble, the argument you're making.

JUSTICE SOUTER: It's really not a bad one. I mean, you don't --

(Laughter.)

JUSTICE KENNEDY: But -- but what you're saying is that all Watson did was to receive the gun. But he agreed to accept the gun as payment.

MR. KOCH: Yes.

JUSTICE KENNEDY: It seems to me that in that sense he used a gun. It wasn't his gun yet, but he agreed that if the gun would be brought to the scene of the transaction, that he would accept receipt of it.

MR. KOCH: I would suggest, sir, that the agreement couldn't rise to the, to the level of active employment as that term is used in Bailey. In other words, at that point all he has done is make a statement that he'll accept something if it's offered. Whereas in Bailey --

JUSTICE KENNEDY: He says, you get a gun, you put it in your car, you come to my house, you bring

that gun with you, and I will give you drugs. I think in a sense he's using the gun. It's through the, the actions of another that he is doing it to be sure.

MR. KOCH: We -- I would take the position that he certainly, in a situation like that where he is, he is not possessing the gun, he is expressing his intentions or desires with respect to it. But he is not in a position to do anything more than that. I don't think that that fits within the definition of "use." I don't think that if I say that, that I'd like to buy your house and if you'll sell it to me, that I'm using the house.

JUSTICE KENNEDY: Perhaps. But it seems to me to unduly constrict the case to say that all he did was receive it. He did more than that. He agreed in advance.

MR. KOCH: It is correct that when he -- that although he initially wanted to ask how much the gun was --

JUSTICE STEVENS: He agreed to let the other party to the transaction use a gun to pay for the drugs, the other party to make the use of the gun.

MR. KOCH: Factually what happened was that he wanted to buy a gun. And then the police officer, the undercover people said, well, instead of giving

money, we'll take drugs for it, which of course, brought us within the statute. That's the factual, particular factual circumstances here.

JUSTICE BREYER: What do you have besides the linguistic argument? I mean, when I start out, I can't think of a reason why Congress wouldn't want to penalize the buyer, not the seller. We are dealing with a statute that does catch your client, if they had only charged him with the right part. But no one in his right mind would ever rely on a ruling in your favor to actually engage in such a transaction, since it would violate the statute in 15 different ways. I exaggerate, but you see the point.

So you have a linguistic argument which people are -- you're right, I think, in saying it's awkward but not impossible. And, therefore, awkward but not impossible; we create an anomaly in the law. I can't think of a reason why to do it. So what else do you have?

MR. KOCH: Bailey. I have this Court's decision in Bailey, Your Honor, namely there that it can't just be a use. Even if we were to go ahead and hold our mouths and make that awkward formation and say what he did was a use, it's still not rising to the level as Bailey interpreted the term of active

employment.

JUSTICE SCALIA: And, of course, you could say the same thing about Bailey, I suppose. You know, What was there in Bailey except -- what was the term, linguistic -- nothing but a linguistic decision.

MR. KOCH: I guess ultimately --

JUSTICE SCALIA: Bailey doesn't make any more sense either from a policy standpoint.

MR. KOCH: I do think --

JUSTICE SCALIA: We sometimes we rely on linguistics, don't we?

MR. KOCH: Yes, sir.

JUSTICE BREYER: And sometimes we try to --

JUSTICE SCALIA: And sometimes the words of the statute.

MR. KOCH: I do think --

JUSTICE BREYER: I don't want to put you in a whipsaw here.

(Laughter.)

JUSTICE BREYER: Sometimes policy seems relevant, too, to figure out what Congress wanted.

But let me go back to the question I had, which is do you want to us overturn Smith? Are you asking that, because I could understand it more easily if you said, look, both sides of the transaction should

be treated alike, but they should be both outside the word "use."

MR. KOCH: I do not believe it's necessary for this Court to overrule Smith in order to rule for the Petitioner here, because of -- because of the differences, first of all linguistically; and secondly because of the reliance on Bailey.

JUSTICE GINSBURG: And in answer to my question, you said you were not urging the overruling of Smith?

MR. KOCH: That's correct. That being said, I think that there is, there are arguments that can be presented, they were presented in Smith, as to whether one could take one position or the other. But it doesn't, it doesn't do violence to Smith to hold for the Petitioner here.

Ultimately, when you look at the Bailey decision and at the facts of Bailey, and there you have people riding around with guns in the trunk of their car, and that's held not to be a use within the statute.

Well, here Watson didn't even do that. He never had the guns in the first place going into the transaction. So it seems to me if Bailey --

JUSTICE BREYER: But he receives the gun and it could have been loaded. And if it was loaded, you

receive a loaded gun, and you're there and you give the money for the gun and you have the gun and somebody comes up, maybe you'll shoot him. I mean, that seems like a risk.

MR. KOCH: Under Bailey, however, if all he did was receive the gun, hold it in his hand, Bailey says that's not enough, that's not a use. And, of course, those are the facts of this case.

JUSTICE KENNEDY: Suppose he received the gun, loaded it and said, well, now, let's renegotiate this transaction?

(Laughter.)

MR. KOCH: As Bailey -- as Bailey thought very clearly, if he then takes the gun and uses it to communicate a threat to the other party, then he is making a use. He is now actively employing it, in this case, as a threatening item.

JUSTICE KENNEDY: But he doesn't brandish it. He just, he puts it in his pocket and he says: Let's renegotiate this. What result? Could the government charge him?

MR. KOCH: Your Honor, I believe if the jury was to find in that factual scenario that that was -- that he was, in fact, silently making reference to the gun, then I think that gets you within Bailey. There's

all kinds of things Mr. Watson could do beyond what the facts of this case are that would turn it, what he did, into active employment and use. But merely getting it and putting it -- and holding it, which are the facts in this record, doesn't -- doesn't rise to the level of use under Bailey.

JUSTICE BREYER: I thought Bailey involved a guy, he had the gun in a locked thing in the trunk of his car, which is a little different from holding it in your hand.

MR. KOCH: There were -- there were actually two, two different fact patterns in the consolidated. One had a gun that was locked up in another room, the other one had guns in the trunk, with expert testimony being that that was the typical method of drug dealers to protect their drugs and things.

JUSTICE GINSBURG: If he has a gun in his hand he is certainly carrying it.

MR. KOCH: He did have the gun in his hand then he would be carrying it under Muscarello and the other cases. That's correct. Yes, ma'am.

Recognizing again I just would point out that whatever condition Mr. Watson had the gun in and -- in this record that's unloaded -- was the choice, not of Mr. Watson but of the people that brought him the gun.

In this clip fed gun it was up to him whether you give him a clip or not, without which the gun is useless, which in this case was the choice of the police officers as to how they were going to hand it to him.

MR. KOCH: I have no other -- nothing else, unless there's any questions.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Koch. Ms. Maynard.

ORAL ARGUMENT OF DEANNE E. MAYNARD

ON BEHALF OF THE RESPONDENT

MS. MAYNARD: Mr. Chief Justice, and may it please the Court:

Petitioner used the firearm by accepting it in exchange for his drugs. In doing so Petitioner used it during and in relation to a drug trafficking crime. Although the situation in Smith was different, the principle of Smith is that use of a firearm as an item of trade or commerce -- specifically used as the medium of exchange -- is a use falling within the meaning of Section 924(C).

JUSTICE SOUTER: But that does not answer the question use by whom. As I understand it, we are not really arguing about whether the gun was used in the transaction; we are arguing about whether the defendant was the one who used it.

MS. MAYNARD: And the Petitioner did use it here, Your Honor. In agreeing to take it in exchange for a certain amount of his drugs --

JUSTICE SOUTER: Yes, but I mean, the problem you, it seems to me you've got that you can't totally paper over is that that's not usually the way we talk. I mean, if I buy a car, and pay money for it, I do not use the car in the transaction. It's what I have after the transaction is complete; and you, you got that kind of linguistic problem here, it seems to me.

MS. MAYNARD: If you buy the car, then you have used the car as an item of trade or commerce during or in relation to that commercial transaction. We don't usually talk that way but we do -- and one can --

JUSTICE SCALIA: It's enough to say we don't usually talk that way.

MS. MAYNARD: I don't think so, Your Honor. As long as --

JUSTICE SCALIA: That's the end of it. We don't talk that way. We don't say use a car when you buy a car.

MS. MAYNARD: Well here, Your Honor, it's important to put it into statutory context, of course, and the statutory context asks whether or not one has used the firearm during or in relation to a drug

trafficking crime, here a drug transaction. And I do --

JUSTICE SOUTER: It adds an additional element you have to prove but it doesn't answer the linguistic point.

MS. MAYNARD: I think one can employ use in a natural way to mean receipt in the way that Petitioner used the firearm here. The subway system uses tokens.

JUSTICE STEVENS: If you're on the other side of the transaction, it's perfectly natural to say I used the gun for the transaction. What is the converse sentence? I used the gun --

MS. MAYNARD: I used the gun as a medium of exchange to sell my drugs. Just in the same way that --

JUSTICE STEVENS: I didn't use the gun as a medium of exchange. I accepted the gun as a medium of exchange. He didn't use it until he got it.

MS. MAYNARD: I believe in any barter transaction, Your Honor, in particular, where one side has said as they negotiate it out, I will sell you this amount of drugs for this particular firearm, then both have used the gun as the medium of exchange --

CHIEF JUSTICE ROBERTS: So if you have -- sorry.

JUSTICE STEVENS: But you don't have the simple sentence. I used the gun to pay for the drugs --

that's easy, but you don't have a simple countervailing sentence.

MS. MAYNARD: I --

JUSTICE KENNEDY: I suppose you could say we used the gun in order to complete the drug transaction.

MS. MAYNARD: And -- and the drug dealer used the gun as the medium of exchange to complete his drug sale, and I do think we do sometimes use "use" in that way, Justice Stevens. The subway system uses tokens. The metro system.

CHIEF JUSTICE ROBERTS: Well, let's say -- let's say you have a duel, and each person in the duel needs to have a weapon. One person has a gun; the other person has the sword. Would you say the person with the sword is using the gun in the duel?

MS. MAYNARD: Well in a --

CHIEF JUSTICE ROBERTS: Because you can't have a duel without both people having weapons.

MS. MAYNARD: You would have certainly used --

CHIEF JUSTICE ROBERTS: You wouldn't say that the person --

MS. MAYNARD: -- the sword as weapon. There is no exchange there, Your Honor. Here it's crucial, because you have during your relation to a drug

trafficking crime, which here is the drug exchange, just like in Smith.

CHIEF JUSTICE ROBERTS: Each person in the drug exchange brings to the table what they've got. The one has the drugs; the other brings the gun. That doesn't mean that the person with the drugs is using the gun.

MS. MAYNARD: If he agrees to trade his drugs for the gun as the currency to close the drug transaction, I believe he has used the gun in the way that we normally use the word.

JUSTICE SOUTER: But the only way you can make that argument is to define the crime as consisting of the agreement as opposed to the consummated transaction.

MS. MAYNARD: No. I think the -- I think the crime is the taking of the firearm in exchange for the drugs.

JUSTICE SOUTER: Well, I thought you said a minute ago that he was using it because he agreed to accept it.

MS. MAYNARD: I think one could make the argument, Justice Souter, that an agreement alone is a use once, one agrees to use the gun as the medium of exchange to sell one's drugs. The Government is not

pressing that point here today and we don't, and the Court need not go that far because here Petitioner did receive the drugs, and the reason that possibly the agreement line goes too far is the rationale of this Court's decision in Smith where the Court pointed out that someone who makes a material misstatement in order to acquire a gun is clearly not using the gun, but the Court gave examples of receipt offenses in, in the forfeiture provisions in Section 924(D) where receipt of a firearm is a use under the statute.

JUSTICE SCALIA: Why -- why wouldn't making a material misstatement in order to obtain a gun constitute a use of the gun -- as much as it, the receipt of the gun constitutes a use of the gun here? What's the difference between the two situations?

MS. MAYNARD: I think one could make the argument, Your Honor, as I said, that making material statement. I'm saying the Court in Smith --

JUSTICE SCALIA: Not if you believe Smith.

MS. MAYNARD: I beg your pardon.

JUSTICE SCALIA: Not if you believe Smith.

MS. MAYNARD: Because -- and that's why the Government is drawing the line today at actual receipt, and that's - that's all that's involved in this case. The actual taking of the firearm where then you have all

the dangers present with which Congress was concerned, which is --

JUSTICE STEVENS: Yes but Justice Breyer made the very persuasive argument that it doesn't make sense to treat both sides of the transaction exactly the same; but isn't it the fact that in many drug transactions the buyer is not treated the same way as the seller? It's a crime to sell poison drugs but it may not be a crime to buy the poison drugs.

MS. MAYNARD: Well, there are two points in response to that, Your Honor. One is that if the buyer of drugs buys the distribution quantity, then we do often treat the buyer as a distributor under the distribution statute.

JUSTICE STEVENS: But generally speaking buyers and sellers are not always treated alike in the criminal law, are they?

MS. MAYNARD: When Congress -- no that's correct, Your Honor; but in those cases where Congress uses words, like it does in the distribution statute, that clearly targets one side or other of the transaction. But here what the Court is interpreting is the much broader word, "use," and we know from Section 924(D)'s forfeiture provisions that Congress employed the word use broadly in Section 924(d) and used it to

include receipt crimes; and Smith cites several examples of receipt crimes that Smith believed was a use, including unlicensed receipt of a firearm from out of State, receipt of a stolen firearm and receipt of a firearm with an intent to commit a felony; and in context Congress clearly did use "use" broadly in Section 924(D). If -- if in response to their argument in Ponce, their argument about (D)(1), the forfeiture provisions in (D)(1) and D 3, I do think those provisions strongly support the Government's argument here.

JUSTICE SCALIA: Why? There's -- they refer to crimes in which there has been a receipt but there has also been a conveyance. Why do you focus on the receiver rather than the conveyer?

MS. MAYNARD: Because our reading, Justice Scalia, gives full effect to the provisions that Congress has carefully chosen to place in (D)(3) and the Petitioner's reading does not.

JUSTICE SCALIA: What are they?

MS. MAYNARD: And if I could explain it. In (D)(1) -- it's on page 8a of our brief, (D)(1)-- in 924(D)(1) Congress provided two principal ways in which the Government can forfeit firearms. The first is if an offense is completed, the Government can forfeit a

firearm that is involved in or used in that offense.

JUSTICE SCALIA: Involved in -- that broadens that enormously, doesn't it?

MS. MAYNARD: Yes it does, Your Honor; but that actually strengthens my point.

CHIEF JUSTICE ROBERTS: It cuts the other way. Congress knows how to say involved in if it wants to reach that broadly, and it didn't do it under the provision in which -- pursuant to which Mr. Watson was indicted.

MS. MAYNARD: Well yes, Your Honor, but if you allow me to continue on, further on in (D)(1) Congress used a narrow subset of crimes some of which include receipt crimes where it only used the word use and that's the logic to this Court's decision in Smith and it applies equally here. Further down in (D)(1) Congress allowed the Government to forfeit firearms intended to be used in certain very specific listed crimes, and in other words to forfeit the firearms before the -- the crime actually is committed. Some of those crimes include -- receipt crimes -- include the very receipt crimes listed by this Court in Smith' and so given that Congress believed that the firearms intended to be used in purely receipt crimes were ultimately going to be used by the receipt, Congress

employed the term here very broadly including to receipt of a firearm.

JUSTICE SCALIA: It could be -- it could have -- it is intended to be used, not necessarily. As -- as your opponent pointed out, this section does not focus on the individual. It focuses on the firearm, simply for -- for confiscation of the firearm. And, therefore, it suffices if either side intended it to be used. It doesn't have to be the recipient who intended it to be used even though it's a receipt crime. It was intended to be used by the other side. Wouldn't that make sense?

MS. MAYNARD: I think if you were to interpret (d)(3) in that way, Your Honor, you would do great violence to what Congress intended. If I can point you to page 10-A of our brief in -- it's (d)(3) that sets forth very particularly the crimes that Congress thought the government should be able to forfeit firearms before the crime occurs.

JUSTICE SCALIA: What page is that?

MS. MAYNARD: It's on the government's gray brief, 10-A. In (e) of 922 -- this is 924. I'm sorry, 924(d)(3)(E). It includes any offense described in section -- and it lists several examples including 922(n). And 922(n) is set forth in the government's

brief on page 2-A, which makes it a crime for someone under felony indictment to ship, transport, or receive a firearm.

Now, under Petitioner's reading they would say: Well, that's fine. That still has meaning. Under our reading of "use," the government can forfeit firearms that the person under felony indictment intends to ship or transport, but cannot forfeit firearms that the --

JUSTICE BREYER: This is what -- this is what is bothering me about your side of this case. I start thinking this is a total fluke. Normally, you would charge him under "possession in furtherance of," which you didn't for reasons I don't know. Or he would be an accessory, which he isn't here because the other side was a government agent. So we've got a fluke.

Now, if I accept your linguistic approach, I don't know what I'm getting into. Imagine an artillery team. One loads the ammunition; the other pulls the trigger. We say the team used the ammunition, but the guy who pulled the trigger by himself didn't.

Think of a baseball team. The pitcher doesn't use the bat, but the team does.

Now, if I take your linguistic approach, where am I in respect to other statutes? But if I deny

your linguistic approach on the ground that it's unnatural to say "use" of the -- the individual used it, all I've done is create a fluke case because it will never come up again.

MS. MAYNARD: I don't think that it's -- several responses, Your Honor. I don't think it's unnatural to use "use" to mean "receipt" when you're talking about using something as a medium of exchange during and in relation to a drug trafficking crime. Because, as I said before, company stores use script. American stores use dollars. French stores use euros. We can use the word "use" and then have to wait --

JUSTICE BREYER: But those are all examples that I used the gun to pay for the item. You don't use the word "use" when you're the seller. It doesn't fit.

MS. MAYNARD: No, Your Honor. I disagree. I think when a company store uses script, that means it accepts script as money from the company employees.

CHIEF JUSTICE ROBERTS: So if Congress passes a statute saying anyone who uses a gun in a crime of violence gets an additional sentence, the person who is shot is using the gun in a crime of violence?

MS. MAYNARD: You wouldn't have to go that far here, Your Honor, because the "use" here is use as a medium of exchange. So the court need go no further.

And that's another response to Justice Breyer. The Court need go no further than it did in Smith, which you -- it doesn't have to -- we have much more than receipt simpliciter here, Justice Breyer. We have the negotiated transaction where he received the firearms as the medium of exchange.

CHIEF JUSTICE ROBERTS: So is that a necessary element of the offense: That the transaction be negotiated in advance?

MS. MAYNARD: No, Your Honor, if you take it as the medium of exchange to sell your drugs. He doesn't dispute that he engaged in a drug trafficking crime, and he doesn't dispute that he took the gun as the currency to close that drug deal, and that is a use within the meaning -- within a natural meaning of "use," if it is used as currency.

JUSTICE KENNEDY: Are you saying that the parties are viewed collectively so that in Justice Breyer's example the pitcher and the batter used a ball and a bat. Is that your position? And in this case the seller and the buyer used drugs and a gun.

MS. MAYNARD: In any bartering exchange, Justice Kennedy --

JUSTICE KENNEDY: Well, does that fit with the words of the statute, any person who --

MS. MAYNARD: Any person --

JUSTICE KENNEDY: Even though it's a collective enterprise, you can still focus on one of the parties and prevail. Is that your position?

MS. MAYNARD: Well, imagine -- imagine a statute that made it a crime to use United States currency during and in relation to a drug trafficking crime. A drug dealer who sold his drugs for cash would surely be in violation of that statute.

This is no different. The Court has already held that using the firearm as currency is a violation of the statute.

CHIEF JUSTICE ROBERTS: I don't think -- I don't see how your hypothetical advances the argument. I mean, I don't necessarily agree that someone who sells drugs for currency is using the currency in the transaction. They are accepting it. It is what they want. That's not the same as using it.

MS. MAYNARD: No, Your Honor. I think they are using it as the medium of exchange, which I think even under the sentence rationale in Smith -- such as -- such as statutes, if you would say: Well, what's the normally intended use of United States currency? And that would be as the medium of exchange, and both parties would be --

CHIEF JUSTICE ROBERTS: Well, that's what weakens your hypothetical. It's not the normal use of a gun as a medium of exchange.

MS. MAYNARD: Yes, but the Court has already held that using a gun as the medium of exchange falls within the statute.

JUSTICE GINSBURG: May I ask --

CHIEF JUSTICE ROBERTS: It held that the person who does use the gun, which is the natural, grammatical construction, uses the firearm. That's quite a bit different than the question of whether someone who receives it as the consideration is using the firearm.

MS. MAYNARD: I think the rationale necessary to the holding in Smith, Your Honor, was that use of a gun as an item of trade or commerce, specifically as the medium of exchange, is the "use." And, in fact, Smith refers several times to an earlier D.C. Circuit decision in Harris, a per curiam, a public per curiam, in which two members of this Court were on the panel, that involved this very fact pattern, where the -- the --

JUSTICE STEVENS: Yes, but the argument in Justice O'Connor's opinion was largely linguistic. The natural use of the word "use" is to say: I used it to

pay for the gun -- I used it to pay for the drugs, rather. But you don't have a countervailing sentence that fits into anything in her opinion, and you haven't really answered his reliance on the -- on the other case, which requires active use.

MS. MAYNARD: I think in -- in Bailey, Your Honor, the Court required a use that makes the gun an operative factor, a use that changes the circumstances where both parties are aware the gun is being used.

This is a far cry from Bailey. This is not locked-up weapons where only one party is aware of their existence to protect the store of drugs. This gun was front and center, part and parcel, of the drug transaction. It was --

JUSTICE GINSBURG: It was -- Watson possessed the gun, would you agree with that, in furtherance of the transaction? Would you say that this case fits the statute, as amended, so it could have been charged as possession?

MS. MAYNARD: Yes, Your Honor. That's the government's position.

JUSTICE GINSBURG: Why was it -- why wasn't possession charged here?

MS. MAYNARD: I do not know the specific circumstances of the charging decision here, Justice

Ginsburg, but in the Fifth Circuit the law was already clear that this was a use. And, indeed, when Congress amended the statute post Bailey to expand this Court's understanding of the meaning of "use," there was no need to address this particular fact pattern because most of the circuits had been --

JUSTICE GINSBURG: But the prosecution would certainly want to assure the success of the argument; and if this is clearly possession, why wasn't possession charged? And does the Department of Justice give any guidance to prosecutors since the 1988 amendment on what to charge in these situations?

MS. MAYNARD: I don't know the answer to that, Your Honor. I don't know the answer to either of those questions, but I do know that we argued in our opposition to the cert petition that this question doesn't have much going-forward significance because of that new amendment.

JUSTICE SCALIA: Maybe they were doubtful about whether the "possession" thing applies here. I don't know. Possesses a firearm in furtherance of the crime -- I mean, the crime has been completed by the time the -- the person who is receiving the gun has possession of it.

MS. MAYNARD: I think it's part and parcel

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JUSTICE SCALIA: It's hard to say it's in furtherance of the crime when the crime is over once he gets it. His possession is not in furtherance of the crime, it seems to me. It's the other person's possession that's in furtherance of the crime. He possesses it so he can turn it over, which is the crime. But I mean I'm just not all that sure that you have a hundred percent easy case on the possession point.

MS. MAYNARD: Well, the Petitioner agreed with you on that, Your Honor, but four circuits have agreed with the government. On the going-forward basis, we think we do have a good argument. Here, and in your hypothetical, imagine the situation where the gun is turned over first, and then the payment -- and then the drugs are traded. It would certainly seem that you possessed it in furtherance there.

I think it is possession in furtherance in -- in -- because it is the sine qua non of drug transactions. It's the very part and parcel of drug transactions. But it does -- this case does matter to the government because the government has prosecuted peeople properly, it thinks, under the "use" prong of the statute. Those people are -- currently stand convicted; and, as experience proves post-Bailey, if

this Court were to rule against the government here, that could have an effect on those people's current incarceration.

If I could get back to my 922(d) point, just to finish up, which is that --

CHIEF JUSTICE ROBERTS: Well, I just -- I don't understand the significance of the argument you just made. Are you saying that because some people might be let out of prison if we correctly construed the statute, we should read it your way?

MS. MAYNARD: No, Your Honor. Of course if the Court feels that these people are properly convicted, then, you know, they can pursue whatever remedies they may have.

CHIEF JUSTICE ROBERTS: So what was your point referring to the people who were convicted under this statute --under this construction of the statute?

MS. MAYNARD: That it -- that it is of ongoing importance to the government, even though as a prospective matter the government may be able to charge this conduct under possession and furtherance.

CHIEF JUSTICE ROBERTS: I thought the argument you made earlier was that this may not be of particular ongoing significance because of the amendment.

MS. MAYNARD: Right, Your Honor. From now on, the government could charge, if you rule against us in this case, we believe we can charge this conduct under possession and furtherance. However, my point is -- is that we nevertheless care about the result in this case. We believe that people in this situation have used a firearm as a medium of exchange during and in relation to a drug trafficking crime and stand properly convicted. It was only to make the point that the government does have an interest in how the Court rules in this case and that it's not meaningless to us which prong applies here.

Back to the 922(d)(4) point, the -- under Petitioner's reading, it would mean that the government can't forfeit firearms in a situation like someone under felony indictment ships or transports -- intends to ship or transform a firearm. Under Petitioner's reading the Government can forfeit that because they consider that to be active verbs, but under -- if the person under felony indictment simply intends to receive a firearm, the government would have to wait until that person receives the firearm in order to be able to forfeit it, and that is -- I suggest that no rational Congress would have meant that by referring to the provision.

They do point to -- well, if there -- if

there are no further questions, the government believes that this crime,this -- that the use of the gun in this manner is a crime, that there's no reason to believe that Congress would have wanted the defendant in Smith to stand convicted of this crime but to leave the drug dealer who ends up with the gun not with the punishment for this crime.

JUSTICE STEVENS: Something just occurred to me. When you distinguish the case,our unanimous opinion requiring active use, you said, well, that -- that gun was in the trunk of a car so -- what if this gun had been in the trunk of the car also and the guy said, well, it's now -- that's your gun?

MS. MAYNARD: Whose trunk is it in, Your Honor?

JUSTICE STEVENS: Well, they just transferred ownership in exchange for drugs with -- by transferring title to a gun that was located in the -- in the trunk of a car.

MS. MAYNARD: If he has constructive possession of it, Justice Stevens, and he's -- I believe he would have received it and that would be sufficient.

JUSTICE STEVENS: So it -- it was not sufficient in -- in Bailey in any case, but it would be sufficient here because it played a role in the

transaction?

MS. MAYNARD: Yes, Your Honor.

JUSTICE STEVENS: Thank you.

MS. MAYNARD: But -- I mean Bailey makes examples to things that would involve an active employment including reference to a gun that -- if the reference to a gun changes the circumstances of the underlying offense.

JUSTICE GINSBURG: But -- but Smith, in Smith, Justice O'Connor used the illustration turning currency into a cannon. You can't do that very well if the gun is in a car, in a locked trunk in a car on the street. You can't turn the currency, the gun, into a cannon.

MS. MAYNARD: That's true, Justice Ginsburg, and if the Court wanted to limit it to "use" means that you've actually taken possession of it because that -- that's all the government is defending here. That's what happened in this case. That's what happens in most of the cases.

I -- I would also like to say in response to their point about the government sting, that if you look at the cases in the courts of appeals, there are many cases where -- that indicate these kinds of trades do happen in the real world absent government involvement.

For example, in the First Circuit's decision in Cotto, which is currently pending before the Court, the -- the person who ultimately came -- became the confidential informant -- before that the drug deal her sold to her drugs for guns on 20 separate occasions. So this does go on --

JUSTICE BREYER: Is -- is there any reason in such a case, if you lost this case, in the future could you not just charge, as Justice Alito said, that they're a principal in the possession by the seller?

MS. MAYNARD: We -- we believe --

JUSTICE BREYER: If the government is not involved? And if the government's involved on the other side, I guess you'd have to charge an attempt.

MS. MAYNARD: There is no attempt offense under Section 924(c), Justice Breyer. You can use a gun during and in relation to an attempted drug crime, but you can't attempt to use a gun.

The -- the government believes it could, on a going-forward basis, charge possession -- oh, you're asking me about whether we could charge aiding and abetting going forward. The -- the Seventh Ccircuit has suggested in Dick that that would be open to the government to charge. I think that -- and potentially, even though it wasn't in the indictment here, it could

be read into the indictment. But there are two possible issues: One that my colleague has pointed out, which is in some cases where Congress has criminalized one side of the transaction but not the other. And so that might be the situation here. The Court --

JUSTICE BREYER: And so your -- your practical argument then is that there has been considerable reliance on your interpretation to the extent that many people have been convicted under it. How many?

MS. MAYNARD: That I don't know, Your Honor.

JUSTICE BREYER: About? About? Have any rough idea?

MS. MAYNARD: I don't know, Your Honor, but there are six circuits on our side of the conflict and -- so it -- it -- I don't know.

If there are no further questions --

CHIEF JUSTICE ROBERTS: Thank you, Ms. Maynard. Mr. Koch, you have 4 minute remaining.

REBUTTAL ARBUMENT BY KARL KOCH

ON BEHALF OF THE PETITIONER

MR. KOCH: Thank you, Your Honor.

As -- as I indicated before I don't think that it's necessary to overrule Smith to rule for the Petitioner, but if -- if consistency on both sides of

the transaction is desired and certainly something has to go, I would suggest it ought to be Smith because otherwise you're stuck with Bailey and with what I suggest are settled principles of statutory construction. The -- I think Smith takes -- takes it about as far as it could go, and you're having to make -- you have to make a number of linguistic compromises to get to the Smith result to begin with.

The -- with regard to the -- the charging as possession or furtherance or not, again it's not before us, it's not part of this case I would suggest that Mr. Watson possessed this firearm as a consequence of a drug transaction rather than in furtherance of a drug transaction.

I do think, and it's obvious from other statutes in the neighborhood, that Congress certainly knows how to say "receive" and "accept" and words of that nature, if it was its intent to -- to make the receipt of a weapon or bring that within the ambit of this -- of this particular statute.

I don't think it's enough to say, as my opponent does, use as a medium of exchange if it's a crime for example to use a forged instrument. The guy who accepts it doesn't use it, I don't think by any reasonable interpretation. So I think that that -- that

really stretches this farther than it should go.

Lastly, I would point out, and again this is in our brief around page 9, with respect to this 924(d) argument, one of the predicate offenses that's used in 924(d) is 922(j), which includes language "it shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of" et cetera. Well, "possess" is there in 922(j), yet we know from Bailey that "possess" in and of itself can't be a use. And that's just one of the reasons why that argument unfortunately falls apart when one is trying to import those definitions of use into this statute.

I have nothing further.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Koch. The case is submitted.

(Whereupon, at 10:59 a.m., the case in the above-entitled matter was submitted.)

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